dug into DTE's application and its exhibits to understand the nature of the program, the program's (few) benefits and (many) costs and risks, and DTE's rationale for its proposal. In Commission proceedings, intervenors such as Soulardarity can ask an essentially unlimited number of document requests and interrogatories; So Jung drafted a dozen of those for us, and, as a direct result, DTE made several disclosures and admissions helpful to our case. So Jung also drafted direct written testimony from Soulardarity's policy director. So Jung spoke with him on several occasions to understand his perspective and present his insights on the experiences of low-income, people of color utility customers relevant to the proceeding. So Jung also researched and drafted the legal standard for a major portion of our brief, the requirement that waivers of billing protections be "effective and efficient" and "in the public interest." To do so, she had to assemble what is essentially the common law of Commission decisions on these points from the past two decades. She shared her research findings with the Michigan Attorney General's office, another intervenor in the proceeding, and the Assistant Attorney General used So Jung's findings as the backbone for that section of his brief. So Jung also wrote the portion of our brief and our reply brief explaining how DTE's proposal failed to meet this legal standard. In the rate case, So Jung worked with a research team to summarize and present as direct written testimony their survey-based findings about the struggles Michigan's low-income customers have paying their utility bills.

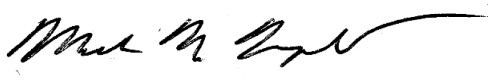
So Jung is a clear, concise, and consistent writer for different audiences. She has drafted two pieces of direct testimony, each more than twenty pages. In those, she had to accomplish several objectives, some of which competed against others at times. She had to present our experts' opinions, the factual support for those options, and the philosophical or ideological frame through which our expert viewed these issues—all in our experts' voices. The testimony needed both to persuade the judge based on the relevant facts and law and to explain to a larger audience why energy affordability is an important social justice issue. So Jung also drafted major portions of our initial brief and reply brief in the Prepay case. As I mentioned above, she wrote a core portion of the legal standards section. In the argument section, she applied the law to the facts, showing that DTE's proposal was neither "efficient or effective" nor "in the public interest." Her writing was effective and persuasive, well-grounded and passionate on behalf of our client's interests. Not to be overlooked, So Jung has drafted excellent written communications to our clients, such as presenting key findings from our factual and legal research and teeing up strategic decisions for them. Doing so has helped ensure positive client relationships and alignment with the organization's mission and grassroots work.

So Jung has demonstrated excellence in her individual work product and when working with her teammates. She keeps me well-apprised of where she stands on each assignment, provides outlines and drafts on a timely basis for my review, incorporates my feedback accurately, and always delivers excellent final work product that exceeds my expectations. Working with her has been among the smoothest experiences I have had with any student. So Jung also works effectively with her peers. For example, last year she coordinated seamlessly with another teammate who was also drafting discovery questions for different parts of the case, developing

other direct testimony, and writing other sections of the brief. The other student's work supported So Jung's because of their regular communication, and vice versa. Our weekly team meetings—regularly led by So Jung—provided the team with time to plan, reflect, and openly discuss emerging ideas, the bigger picture for the project, and our work process. The Michigan Energy team was among the most functional student teams that I have worked with in the past ten years, and So Jung was a key contributor to it.

In sum, I highly recommend So Jung to you. She is a dedicated, thoughtful, hard-working legal researcher and writer. She cares about the quality of her work, delivering high-quality drafts, readily incorporating feedback, and learning the lessons from those interactions to be even more effective on future assignments. She also has a great attitude, is happy to work hard, and takes the time to appreciate the completion of major deliverables. I know she would serve you well. Please do not hesitate to contact me at templeton@uchicago.edu or 773-702-6998 if I can be of further assistance.

Respectfully,



Mark Templeton
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June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

It is my pleasure to recommend So Jung Kim to you as a law clerk. She is intelligent, motivated, and an excellent communicator. At the law school, So Jung has demonstrated a strong commitment to public service, while developing her research and writing skills as a research assistant and a member of the law school's flagship journal. I believe she would be a fine law clerk.

I had the pleasure of having So Jung in my Administrative Law class her 2L year. She received a 182 in the course, which is a solid A on a more traditional scale. Her exam was extremely well-organized and spotted many issues that her classmates did not. To provide some broader context for his transcript, unlike many law schools, the University of Chicago adheres to a very strict curve with a median score of 177, which is roughly a B on a more familiar scale. Because there is rarely much movement around the median, So Jung's strong grades across a wide range of courses testify to her breadth. What stands out to me in particular are her strong grades in legal research and writing.

So Jung would arrive in your chambers with an uncommon amount of practical experience under her belt. She has been an active member of our school's environmental law clinic, where she has worked on trial-related proceedings. In addition to her experience at the Federal Trade Commission, So Jung was also her college newspaper's primary copy editor and fact checker until graduation. I can think of few experiences that would be better preparation for providing legal cite-checking and research assistance.

So Jung also has many interests outside of the classroom. She enjoys ceramics: wheel-throwing, hand-building, and glazing. Here at the law school, So Jung organized and led as captain a law student intramural broomball team. This would have been her sixth season on the ice after five intramural seasons in college (both women's and co-ed teams). Finally, she is also a big bikeshare booster for commuting and recreation, reflecting her long-running interests in transportation policy.

In short, I believe So Jung Kim will be a fine law clerk. She has been a pleasure to have in class and will be a great colleague to her co-clerks. In the longer run, she is interested in government public service, either at the municipal or federal level and I am confident that she will be a respected member of the legal community. Please do not hesitate to contact me with any questions. I can be reached at your convenience at jnou@uchicago.edu or at (203) 907-8618.

Best regards,

Jennifer Nou
Professor of Law
University of Chicago Law School

So Jung Kim Clerkship Application Writing Sample

The following writing sample is a brief excerpt from a live Michigan Public Service Commission case regarding the electric utility company's request to waive consumer-protection billing rules for a prepayment program (U-21087 public docket available here). It was filed as part of my work in the Abrams Environmental Law Clinic at the University of Chicago Law School on May 5, 2022.

The full brief was a collaborative effort across a team of three clinic students. The waivers argument section was my full responsibility. This 11-page excerpt reflects my research, analysis, arguments, and general writing style. I received feedback and editing from my clinic professors. It is shared with permission.

ARGUMENTS

I. The Commission Should Not Approve the Requested Waivers.

DTE's evidence and arguments fail to meet the legal standard necessary for justifying a temporary waiver of consumer protections, namely that the waiver will "further the effective and efficient administration of these rules and is in the public interest."[1] DTE is asking for a permanent waiver of the rules—which is not permissible according to the express language of the Billing Rules. Also, while the Billing Rules allow for waivers to facilitate the efficient and effective administration of the rules, the Billing Rules do not allow for waivers to facilitate the administration of utility programs. Thus, DTE is seeking to shirk necessary and beneficial consumer protections permanently—not to improve the administration of the Billing Rules in the public interest.

To implement its proposed PrePay program, DTE requests that the Commission put aside many long-established Billing Rules[2] that provide notice, due process, and other safeguards for consumers before a utility shuts off their service.[3] The requested waivers are unnecessary for a prepaid program to be implemented, leave financially vulnerable customers vulnerable to uncertain and insufficient notifications in place of established consumer protections, deprive customers of notice about due process protections, and put customers at the mercy of the Company with

[1] Mich. Admin. Code 460.101a(3).
[2] The seven requested waivers are of Billing Rules 460.120 (3) (billing frequency and method of delivery); 460.129(4) (access to information about energy assistance programs in past-due notices including the number of a utility representative able to provide information about the programs); 460.139(1) (mail or personal service notice no less than 10 days before proposed shutoff of service); 460.139(6) (no less than two attempts at telephone notice or else notice on the premises about impending shutoff); 460.140(1) (information to be included in the shutoff notice such as name, address, clear and concise statement of reason, date, rights to enter payment plans or settlement, and how to file a complaint); 460.140(2) (additional information to be included in shutoff notice for residential customers with dual commodities and energy assistance for eligible low-income customers); and 460.143(1) (requirement that utilities make at least two attempts to contact the customer facing an involuntary shutoff via mail, telephone, and physical visit to the premises). Hatsios Direct Testimony, 2 TR 50–54.
[3] U-21087, Application, Sept. 29, 2021 at 1–3.

respect to future changes the Company wants to make to important aspects of the program's implementation. Rather than an innovation to administer the rules more efficiently and effectively, the requested waivers would gut necessary and beneficial protections and do so without providing meaningful gains to the public. In fact, the proposed waivers harm financially vulnerable Michigan residents by driving them more quickly and closer to shutoffs, all at a cost to ratepayers of nearly $13 million for information technology and training.

During cross-examination, the weakness of the Company's position became self-evident. Witness Hatsios admitted that the Company's requests go beyond what changes would be necessary to implement a PrePay program and that continuing to provide many of these protections would not impose a significant burden on DTE.[4] Furthermore, Witness Hatsios admitted that DTE is under no obligation to institute the PrePay program at this time, and nothing is preventing the Company from waiting to implement it until after the Commission promulgates new Billing Rules specifically governing prepayment regimes.[5] These admissions provide further support for the fact that the Commission should not provide a waiver to DTE of these vital customer protections at this time.

A. The existing Billing Rules at issue here provide valuable and necessary consumer protections that the Commission should maintain.

The Billing Rules "are intended to promote safe and adequate service to the public and to provide standards for uniform and reasonable practices by electric and natural gas utilities in dealing with residential and nonresidential customers."[6] These rules ensure that a utility cannot exploit customers through its monopoly control over an essential service. These protections set minimum

[4] *See* Hatsios Cross Examination, 2 TR 126–150.
[5] Hatsios Cross Examination, 2 TR 150.
[6] Mich. Admin. Code R.460.101.

requirements for utilities on many issues, from applications from new customers for service to deposits,[7] meters,[8] billing and payment standards,[9] voluntary termination,[10] energy assistance and shutoff protection programs for residential customers,[11] shutoff and reconnection procedures,[12] customer relations,[13] disputes,[14] hearings,[15] settlements,[16] and appeals.[17]

At stake in this particular case are billing rules that especially help to protect financially vulnerable customers. As one example, to reduce the likelihood that customers lose access to power, Rule 460.139(6) provides no less than two telephone-based notices impending involuntary shutoff and thus affords customers several key opportunities to correct any problems in their control that may prevent shutoffs. Rules 460.129(4) and 460.130(2)(b) also assist financially vulnerable persons by requiring the utility to share information about energy assistance programs to help ensure bills can be paid and power stays on.[18] Rules 460.140(1) and (2) provide information about rights to dispute a bill, to a hearing before a hearing officer, to representation, and to settlement, among other notice requirements and procedural protections. In essence, the rules require the utility to give notice in many forms early enough so that customer at risk of shutoff has time to make

[7] Mich. Admin. Code R.460.108–12.
[8] Mich. Admin. Code R.460.113–16.
[9] Mich. Admin. Code R.460.117–126(b).
[10] Mich. Admin. Code R.460.127.
[11] Mich. Admin. Code R.460.128–34.
[12] Mich. Admin. Code R.460.136–44.
[13] Mich. Admin. Code R.460.145–53.
[14] Mich. Admin. Code R.460.154.
[15] Mich. Admin. Code R.460.156–57.
[16] Mich. Admin. Code R.460.158–59.
[17] Mich. Admin. Code R.460.160–69.
[18] Even though energy assistance from third parties can come too late, or customers can be bound into unsustainable financial arrangements where their debt balloons to sums impossible for them to repay, *see* Johnson Direct Testimony, 2 TR 260, the Billing Rules provide at least some minimum protections to financially strapped customers.

changes to things within their control—such as reducing energy usage, seeking financial assistance, disputing a utility's claim with the utility or through independent review, or making a payment—to avoid the shutoff.[19]

The Commission should recognize the power of the Billing Rules to protect low-income and other financially vulnerable customers and leave the rules fully in place. The rules help to keep utilities from removing vital services from customers, especially when they are in need, and gives them notice of the important due process rights customers have to protect themselves.

B. DTE fails to justify the requested waiver of these consumer protections.

1. The Billing Rules do not authorize permanent waivers, only those of a temporary scope.

Rule 460.101(a)(3) states that temporary waivers can be sought to improve effective and efficient implementation of the rules. Therefore, the Commission cannot authorize DTE's requested relief of permanent waiver.[20] Temporary waivers could be appropriate for pilots or short-term, emergency situations; they are not appropriate—or even allowed—for programs without an end date, such as the one DTE is proposing here.

2. DTE fails to demonstrate that the waivers "will further the effective and efficient administration of these rules."

Because DTE's requested waivers are overly broad and undermine the purposes of the consumer protections provided by these rules, DTE has not shown that the waivers "will further the effective and efficient administration of these rules."[21] DTE's position is essentially that the Commission should remove any and all billing rules that makes it more "effective and efficient"

[19] Stigma from shutoffs can led to tragic outcomes. For example, one Detroit resident who lost power brought in gas generators to heat their home and tragically passed away from carbon monoxide poisoning in 2018. *See* Johnson Direct Testimony, 2 TR 270–71.
[20] Hatsios Cross Examination, 2 TR 112 (admitting there is no sunset date for the waivers requested).
[21] Mich. Admin. Code 460.101a(3).

for DTE to run its operations and collect from customers. Instead, however, the Company should—and can[22]—continue to provide notice of a pending shutoff, assistance programs, and due process rights through all available means before shutting off a customer. Continuing to provide the notice that DTE seeks to eliminate would not prevent the program from achieving its purported benefits. Moreover, the Commission should not put customers in a position of having to rely on DTE's promises that it will provide sufficient notice in the future, especially when Witness Hatsios confirmed during cross-examination that DTE can change the PrePay notifications entirely at its own discretion after the Commission waives the Billing Rules.[23]

Moreover, the Company has admitted that it can change—on its own whim, at any time, with an unenforceable commitment to consult Commission staff—any element of the PrePay program,[24] including the flimsy protections that it claims this proposed program will provide to customers.[25] For example, if DTE finds that the five-day, three-day, and one-day out notifications are not working for the Company, then the Company can experiment with another timing schedule without a requirement to consult Commission staff or other stakeholders. But it is the Commission, not DTE, which has the authority and responsibility to determine if such changes would "further the effective and efficient administration" of the Billing Rules.

The Company has offered only a feeble description of how it will inform customers fully about program details and how drastically the program changes their interactions with the utility. Witness Hatsios admitted that DTE has not fully developed marketing and training materials for customer service representatives who will be responsible for screening customers to determine

[22] Hatsios Cross Examination, 2 TR 110.
[23] *Id.* at 120, 130. *See also* 148–49 (Hatsios stating that DTE will consult with Staff but does not need to seek subsequent Commission approval).
[24] *Id.* at 120.
[25] *Id.* at 130.

whether PrePay could be a viable option for them.[26] Because these are incomplete, the Staff and intervenors could have not reviewed them. Given prior failures of DTE's customer service representatives,[27] there is little reason to trust or rely on this customer-facing department to inform enrollees adequately about the risks of their participation.[28] The Commission should not be fooled by DTE's claims that enrollment in the PrePay program is voluntary: the program cannot be voluntary if DTE fails to provide anything less than complete information to customers considering participation so they can make meaningful decisions.[29] While streamlining notice to text messages, emails, and mobile app notifications seems more efficient facially, the changes proposed by DTE undermine the effective administration of the rules by stripping away protections without instituting strong, enforceable replacements.

Even if postal mail or door-knocking notice may be redundant to mobile app notifications and be imprecise with respect to timing, DTE can still provide those methods, which can help make customers aware of their proximity to a harmful shutoff, the forms of assistance to which they may be entitled, and their due process rights.[30] These methods of notice are especially important for customers who are likely to experience issues with cell and internet service and who could miss the electronic notifications that DTE is planning to employ. DTE is incorrect in stating that maintaining the status-quo forms and frequency of shutoff notices are simply incompatible

[26] *Id.* at 104–05.
[27] *See, e.g.,* Johnson Direct Testimony, 2 TR 266–68 (describing a mishandled shutoff protection agreement that ballooned into debt collection).
[28] Mojica Rebuttal Testimony, 2 TR 251.
[29] Bunch Direct Testimony, 2 TR 295; Johnson Direct Testimony, 2 TR 277–78; *see also* Bunch Direct Testimony, 2 TR 328 ("An agreement offered by the utility is not truly voluntary if it is too complicated for many customers to fully review and understand, if the customer has no reasonable alternatives to accepting the agreement, or if the utility has power to essentially compel the customer to accept the agreement.").
[30] Bunch Direct Testimony, 2 TR 337.

with its proposed program. Chasing after what is fashionable in the utility sector,[31] DTE is proposing to replace reliable belts with untried suspenders before the Company has proven that the experimental suspenders suffice; it does DTE no harm—and helps customers—for DTE to provide both belts and suspenders to protect customers from the loss of essential electricity service.

3. DTE fails to demonstrate that the waivers would be in the public interest.

The PrePay proposal does not offer substantial benefits to participating DTE customers and increases risks to them at significant cost to ratepayers more generally. To the extent to which there are benefits for customers from prepaying for their electricity, they can already do so and can track energy use based on transparent, real-time data[32]—while retaining their full customer protections—under the existing post-pay program. DTE did not incorporate feedback it received from low-income customers as to their interests in and concerns about such a regime.[33] PrePay harms the public interest because it seeks to eliminate key protections that mitigate the harm and frequency of disconnections.[34] This goes directly against the public interest of residential Michigan customers who rely on power to keep the lights and appliances on, to study and work from home, and to live comfortably. It is simply not in the public interest for the Commission to approve a program and requested waivers if the purported benefits do not exist and the harms and risks to customers are significant.

PrePay offers no meaningful benefits to customers. DTE's fundamental rationale for the program is to give customers the opportunity to prepay if they so choose, but they can already prepay without this program by paying more than their end-of-month charge and accruing a surplus

[31] Hatsios Direct Testimony, 2 TR 30.
[32] Hatsios Cross Examination, 2 TR 106–07.
[33] *Id.* at 91–92.
[34] Mojica Rebuttal Testimony, 2 TR 250. Mojica Direct Testimony, 2 TR 242–43.

to roll over to the next billing cycle.[35] Despite the availability of this option, customers are not measurably choosing to take advantage of prepayment, even with their consumer protections intact.[36] DTE has no evidence that customers are taking advantage of the opportunity to prepay now.[37] Thus, one can reasonably infer that DTE's customers find no meaningful benefits to prepaying their bills.

Given the lack of benefits, perhaps it is not surprising that DTE did not incorporate substantial feedback received from the relevant public[38]—namely financially vulnerable customers who are one of the primary target segments for this program —into the current proposal for a prepay regime. Those interviewed at the end of 2021 participants expressed concerns that PrePay added little appeal beyond existing programs like auto-pay or BudgetWise Billing; that PrePay allowed DTE to gain control of their money sooner; and that PrePay provided significantly less flexibility in an arrears situation than a conventional post-pay system.[39] During cross-examination, DTE Witness Hatsios confirmed that DTE made no changes to its resubmitted application based on any of the feedback from this report or from any other feedback received from low-income customers.[40] Moreover, there are no strong indications that PrePay was proposed in response to consumer demand or explicit requests.[41] The lack of attention to the actual demands and concerns of financially vulnerable customers is a consistent problem when DTE develops its offerings, but

[35] Mojica Direct Testimony, 2 TR 237–38; Ex. SOU–5, DTE's Response to Michigan Attorney General and Citizen's Utility Board of Michigan's First Discovery Request, AGCUBDE-1.3di., 2 TR 225.
[36] Mojica Direct Testimony, 2 TR 237–38.
[37] Ex. SOU–6, DTE's Response to Michigan Attorney General and Citizen's Utility Board of Michigan's First Discovery Request, AGCUBDE-1.3dii, 2 TR 225 ("[T]he Company does not have data or evidence to suggest post-pay customers pay more than they owe as a form of prepay.").
[38] Hatsios Cross Examination, 2 TR 91–92.
[39] *See* Ex. SOU-12, Attachment to DTE's Response to Soulardarity's First Discovery Request SDE-1.11c, SDE-1.12-01: DTE Prepay Program Study Final Report (Dec. 3, 2020), 2 TR 256, at Slides 14–15.
[40] *See* Hatsios Direct Testimony, 2 TR 90–91.
[41] *See* Hatsios Cross Examination, 2 TR 180–82 ("[PrePay] bubbled to the surface as something that management thought would provide benefits to customers . . . .").

with PrePay, it is more damaging because of how this program focuses on financially vulnerable residents[42] and puts them on the fast track to shutoffs.

There are real foreseeable risks and harms from the PrePay proposal. Waiving the Billing Rules removes protections that are important for customers, and it endangers low-income and other financially challenged customers. DTE did not sufficiently explain how its program design will adequately protect customers in the absence of the Billing Rules, if waived as requested. This is most concerning with regard to the lack of notice—which makes customers aware of their bills, the imminent risk of shutoffs, modes of assistance, and means of recourse.

While the Company stated that the PrePay system will provide real-time usage information and alerts five days, three days, and one day before estimated time of shutoff, these may not reach customers without reliable phone or Internet service.[43] These electronic notices are an incomplete replacement. For example, after waiving the mandate to inform customers about energy assistance programs as required by Rule 460.129(4), the PrePay engine would share the phone number of a DTE representative that could provide information about energy assistance programs *only one day before* they are estimated to be shut off and without enough time for that kind of help to materialize to keep the lights and power on.[44] Also, in the event that a customer received a five-day notification and then unexpectedly used up their remaining energy balance in less than five days (say, in one day), they immediately become eligible for disconnect and starting accruing unpaid usage.[45] In that scenario, the Company could cut them off sooner if their usage is greater than what the company predicts will take five days.[46] This fails to protect low-income consumers who are already

[42] Hatsios Cross Examination, 2 TR 97–99.
[43] Mojica Direct Testimony, 2 TR 240.
[44] Hatsios Cross Examination, 2 TR 128–29.
[45] *Id.* at 129.
[46] *Id.*

stretching their limited budget to pay important bills and rather leads them closer to the brink and outcome of a shutoff.[47] These people may be the ones buying power days or hours at a time if income is not consistent and depriving themselves of essential energy to make ends meet at home.

Although DTE says PrePay customers can revert to post-pay at any time,[48] if the customer has arrears, DTE will then require a security deposit and payment of outstanding balances[49] which the customer may not have enough funds to provide if they are struggling to put money into their prepaid account. Moreover, according to Witness Hatsios's testimony, the customer may have to make immediate payment on some or all of their original arrears, even if they would not have had to do so if they had remained enrolled in the post-pay program.[50] Also, DTE has not clarified whether and when the seven requested waived rules about notice come back into practice for an affected customer who is transitioning from PrePay back to postpaid. The timely provision of this information is necessary so that the customer can turn the power back on and establish a workable way to pay on their own.

The waivers are not in the public interest, even if participation in the program is "voluntary," as DTE likes to claim.[51] A customer who enrolls in the program at a time when they are financially stable is likely waving those notices without a full understanding of how important those notices will be in the future. Even if the Company provides that information to participants at the time of enrollment, waiver of the Billing Rules removes the obligation on DTE to notify the customers closer to being shutoff when they need information about a pending shutoff, assistance,

[47] Mojica Direct Testimony, 2 TR 238. Customers who are faced with medical emergencies will experience a delay in sharing document with the Company and then being removed from the program since this makes them ineligible. Hatsios Cross Examination, 2 TR 144.
[48] Hatsios Cross Examination, 2 TR 140.
[49] Hatsios Cross Examination, 2 TR 195; Hatsios Direct Testimony, 2 TR 48.
[50] See Hatisios Cross Examination, 2 TR 194–98.
[51] Hatsios Direct Testimony, 2 TR 35; Hatsios Rebuttal Testimony, 2 TR 63; Hatsios Cross Examination, 2 TR 102, 199–200.

and due process rights. Moreover, the Billing Rules do not contemplate customers waiving these notifications voluntarily. Thus, any suggestion that a customer can knowingly waive these rights voluntarily is misplaced and out-of-step with the language and purpose of the Billing Rules.

Last, and far from least, the program costs too much. According to the Company's own estimates, in the low and middle scenarios, the cost of the program of the program is millions of dollars higher than the possible reductions in uncollectible expense due to PrePay.[52] Further, any projections about reductions in uncollectible expenses are speculative at best and seem high, given customers' concerns and apparent lack of interest.[53] The Company requested $12.6 million in cost recovery for PrePay in U-20836 for the initial three years of the program.[54] Witness Hatsios admitted that DTE has already spent between $7 million and $8 million of that amount[55]—all prior to receiving approval from the Commission to implement this program. The Commission has rejected utility requests to recoup much smaller amounts for similarly speculative investments in billing programs.[56] Such extraordinary and exorbitant costs are surely not in the public interest.

[52] Ex. SOU–16, DTE's Response to Soulardarity's Second Discovery Request, SDE-2.32a, 2 TR 225 (estimating a low outcome of $939,301 and medium outcome of $6,180,806).
[53] See *infra* Facts: DTE's Prior Pre-Pay Efforts, The Pay-As-You-Go Pilot.
[54] Hatsios Cross Examination, 2 TR 154.
[55] Hatsios Direct Testimony, 2 TR 122–23.
[56] *See, e.g.,* U-20561, Order, May 8, 2020, at 197 (rejecting a fixed bill pilot with projected O&M expenses of $900,000).

So Jung Kim Clerkship Application Writing Sample

The following writing sample is an excerpted appellate brief. This assignment was completed during Spring Quarter 2021 for my first-year legal research and writing course and was followed by oral argument. I was assigned to be counsel for the plaintiff-appellee and employee Katara Hakoda. My original analysis has been excerpted and only includes one issue: the Equal Pay Act. I did not receive feedback or editing.

STATEMENT OF THE CASE

I. Hakoda's Employment

Katara Hakoda is a Systems Engineer who primarily works out of Appa Transport Systems' New Orleans headquarters. R4; R7, ¶¶ 2–3. Appa serves clients in the oil and natural gas industry with pipeline management and other transportation/logistical support. R7 ¶ 1. It relies on systems engineers for three main tasks: to monitor oil flows to flag potential infrastructure system failures; to direct flows to various destinations in response to real-time pipeline volume, storage facilities, and market pricing changes; and to travel across the Gulf Coast for quarterly On-Site Infrastructure and Process Improvement visits. R1; R7, ¶¶ 4–5. Notably, the role also requires a set number of overnight Responsive Management Shifts; Hakoda is assigned to four such shifts each month. R7, ¶ 5.

Hakoda has been with Appa since January 2016 and has worked as a Systems Engineer since April 2017—a role for which she consistently receives positive evaluations and is well-qualified with both undergraduate and graduate degrees in the field. R7, ¶ 2, 6–7. Her annual salary, as of January 2019, is $110,500. R7, ¶ 8. At the start of 2020, she had seven years of work experience. R7, ¶ 6.

II. Feng's Hiring and Appa's Pay Discrimination

In January 2019, Appa manager Clay Kuei met Long Feng, then working at competitor Bosco Logistics, at the annual Gulf Coast Petroleum Systems Conference in Baton Rouge, Louisiana. R8, ¶ 9. Kuei was on the lookout for potential engineering hires, as instructed by the company to navigate a "tight labor market in Louisiana." R5; R8, 9–19. Feng's Systems Engineer job at Bosco was comparable to Hakoda's with two distinctions: no overnight work and an approximate salary of $115,000. *Id.* Kuei reported Feng's profile to Appa's Chief Talent

Officer Bridget Azula. *Id.* She approached the manager again in March 2019 to discuss recruiting Feng to replace an outgoing engineer. *Id.* Kuei advised that Feng "would need to be offered at least $125,000" to leave Bosco Logistics, join Appa, and take on its additional work responsibility of regular overnight shifts. *Id.*

Azula reached out to Feng with details about the position and an initial $125,000 salary offer. He then formally applied and interviewed for the job, accepted an offer with that salary, and started with Appa on May 13, 2019. *Id.* He has an undergraduate degree in systems engineering and had ten years of work experience, as of January 2020. *Id.*

Hakoda and Feng have the same job title and responsibilities, including four monthly overnight shifts as prescribed by the company's seniority system, though they manage different pipelines in Appa's network. R9, ¶ 20. The parties agree that their qualifications are roughly equivalent. R4–5. However, Feng earns $125,000 annually to Hakoda's $110,500. R9, ¶ 21; *supra* Section I.

III. Procedural History

Hakoda learned of this alarming discrepancy and filed suit in the Eastern District of Louisiana. R5. In January 2020, Hakoda sued Appa alleging the $14,500-higher pay Feng received for equal work violated the Equal Pay Act. R2. [OMITTED] Following the instruction of a court-appointed mediator, the parties submitted a joint stipulation of material facts on July 9, 2020. R5, 7–9. On November 12, 2020, the same district court granted Hakoda's motion for summary judgment on the agreed-upon facts and entered judgment in her favor holding that Appa's affirmative defense failed as a matter of law. R6. The Court of Appeals for the Fifth Circuit consolidated Appa's appeals of the denial of the motion to compel arbitration and summary judgment granted for Hakoda on March 29, 2021. R10.

ARGUMENT

I. Appa Failed to Mount A Valid Affirmative Defense of "Any Other Factor Other Than Sex" Against Hakoda's Prima Facie Equal Pay Act Case.

The Equal Pay Act was enacted to rectify endemic discriminatory wage structures in private industries, where men continued to be paid more than women for the same job. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The Supreme Court advised that the broadly remedial statute should be applied to fulfill Congress' intent: that "equal wages reward equal work." *Id.* at 195, 208.

An EPA claim has a two-step framework. 29 U.S.C. § 206(d)(1). First, the plaintiff must establish a prima facie case of pay discrimination. At this stage, the aggrieved employee must show they were paid less than member of the opposite sex "for equal work on jobs the performance of which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). Then the burden shifts to the employer, which may assert an affirmative defense for the pay gap among four enumerated exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). In 1983, this Court listed non-discriminatory considerations that would account for wage differentials: "[d]ifferent job levels, different skill levels, previous training and experience." *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1138 (5th Cir. 1983) (citing *Pouncy v. Prudential Ins. Co. of America,* 668 F.2d 795, 803 (5th Cir. 1982)). These are captured in the three specific exceptions from the EPA: seniority, merit, and productivity.

"Any factor other than sex" is a contested, catch-all provision on which different circuits disagree. Most recently, the Ninth Circuit held that it only captures job-related factors. *Rizo v. Yovino*, 950 F.3d 1217, 1223–24 (9th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 189 (2020).

The Second, Fourth, Sixth, Tenth, and Eleventh Circuits have also cabined the scope of the fourth exception. *Id.* (collecting cases). Only the Seventh Circuit is in the minority with a broad read to count truly anything other than sex. *Id.* at 1226 (citing *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989)). The Second Circuit rightfully cautioned that this approach would open a loophole that would allow pretexts for discrimination. *Id.* (citing *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992)).

The fourth exception is the only issue before this court. Appa concedes that Hakoda established a prima facie case of pay discrimination. R6. She showed she was paid less than a man for equal work under similar conditions. *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460, 466 (5th Cir. 2021). Because Appa did not raise the first three exemptions with the district court, it will not be able to argue them on appeal. R6. A reasonable factfinder would clearly reject Appa's "factor other than sex" defense. In light of the joint stipulation that both parties agreed to, no genuine disputes of material fact remain in the case.

A. Market forces of a tight labor market are not acceptable defenses of factors other than sex.

Economics broadly construed as "market forces" has been explicitly rejected by the Fifth Circuit as a valid affirmative defense to an EPA claim. In a case where men who worked at night were paid more than women who performed the same job during the day, the Supreme Court reasoned that the difference in working times was not justified as a facially neutral factor other than sex because it merely exploited a sex-based norm that underpaid women for equal work. *Corning Glass Works v. Brennan*, 417 U.S. at 207–08. The company took advantage of the availability of women who were willing to work for lower pay than the men. *See id.* at 204–05.

The market force of a tight labor market alone is not sufficient for the fourth exception. When a university health system tried to justify a lower wage for a woman so that it could attract qualified individuals in a competitive faculty job market, this Court cited long-standing precedent that such an argument would perpetuate the very sex discrimination Congress passed to EPA to remedy. *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001). Siler-Khodr's higher-paid colleague testified that he accepted the faculty post with his wife's employer because he wanted to leave private industry and engage in research, not because of the salary—defeating the university's defense. *Id.* A tight labor market was rejected even earlier by this Court when it held that greater hiring competition for male salespeople and tailors did not justify paying men more than women with similar skillsets. *Brennan v. City Stores, Inc.,* 479 F.2d 235, 241 n.12 (5th Cir. 1973).

The lower courts crystallize decisions handed down by the courts of appeals. In another university sex-based pay discrimination case, the District Court for the Southern District of Texas reasoned from *Siler-Khodr* that an employer had the burden to show evidence that the market forces it alleges to rely upon for a pay differential are non-discriminatory. *Sauceda v. Univ. of Texas at Brownsville*, 958 F. Supp. 2d 761, 780 (S.D. Tex. 2013) ("[t]he market does not enjoy a presumption that it is free from the discriminatory assumptions and stereotypes in the labor market Congress passed the Equal Pay Act to eradicate."). The university employer contended salary compression was a legitimate market force that explained why outside hires generally garner higher pay than current faculty members. *Id.* at 766. Without evidence that the neutral phenomenon arose from deep-seated stereotypes suppressing women's compensation, the employer did not succeed in its motion for summary judgment. *Id.* at 780.

Appa is asserting a market forces argument for discriminating against Hakoda in pay that is not legally permitted. At the district court level, Appa asserted that it paid Feng more to recruit him from his prior job at Bosco Logistics, where he was paid a higher rate and did not have to work overnight shifts. R6. Taking into account the majority rule that the fourth exception must be a job-related factor other than sex, and not "any" other factor, the bounds of the former still do not accept general market forces.

However competitive the job market for systems engineers might be in Louisiana, it is impermissible grounds for pay discrimination. The district court rejected Appa's assertion as an untenable market forces argument following *Siler-Khodr* and granted summary judgment to Hakoda. The attempted defense was based on factors not relevant to the current job with Appa, namely Feng's former schedule. R6. At worst, Appa is taking advantage of highly qualified and experienced women systems engineers like Hakoda who were (unknowingly) working for less than their labor value. As prescribed by *Sauceda*, Appa could try to prove that any wage differentials in the specialized prospective hiring pool specifically were based wholly on market factors other than sex. There is no evidence in the record to support this proposition.

B. Prior pay is untenable as an affirmative defense of a factor other than sex.

Whether considered within or separate from market forces, salaries from former jobs are not accepted under the fourth exception because they are not adequately unrelated to sex. "Prior pay—pay received for a different job—is necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." *Rizo*, 950 F.3d at 1227. The history of sex-based wage discrimination is an unfortunate but lasting legacy that disqualifies prior pay from satisfying the fourth exception. *Id.* at 1228 ("[A]llowing prior pay to serve as an

affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities.").

The relationship between prior pay and job qualifications and performance is not apparent. In *Rizo*, the employer school district could not explain why or how prior pay was indicative of a math consultant's ability to do her job. 950 F.3d at 1228. The court noted that the employer always maintained the option to assert legitimate job-related factors as the basis for the pay differential; but apparently in Rizo's colleagues' case, there were none. *Id.* A concurring opinion followed a different logical chain to conclude that the employer could not rely on past salary alone as a defense: because prior pay was the only difference between Rizo and her male colleagues, the preexisting differential entrenched unequal pay for equal work based on sex. *Id.* at 1233 (McKeown, J. concurring).

Legitimizing prior pay under the fourth exception would undermine the spirit of the EPA. In *Kouba v. Allstate Insurance Co.*, which the Ninth Circuit overruled in two *Rizo v. Yovino* decisions, the Court of Appeals was concerned that an employer might assert some business reason as pretext for a discriminatory objective, particularly a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women. 691 F.2d 873, 876 (9th Cir. 1982), *overruled by Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *and Rizo*, 950 F.3d 1217. Even more succinctly, the Eleventh Circuit stated that opening the door to prior pay "would swallow up the rule and inequality in pay among genders would be perpetuated." *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

The District Court for the Southern District of Texas has pried open the door to prior pay as a valid consideration. The sole qualification is that it must be consistent with the purposes of the EPA. *Sauceda*, 958 F. Supp. 2d at 776–77 (collecting cases). For all the reasons above as

articulated by the sister circuits, a decisive holding from this Court can resolve this issue and ensure future litigants in its jurisdiction understand that prior pay is practically off-limits for the fourth exception.

Even if this Court accepted a tight labor market assertion, Appa's affirmative defense would be based in prior pay, which itself is rejected by the case law. R3. Kuei and Azula offered a $10,000-raise to Feng based on a consideration of his prior pay. The Fifth Circuit must interpret and apply the EPA with an understanding that prior pay is tightly wrapped up with pervasive sexism and cannot justify Hakoda's significantly lower rate of pay. Otherwise, Appa must unseat the assumption that Feng's $115,000 rate at Bosco Logistics may be the product of engrained, sex-based wage disparities. It fails to do so here. This requirement can help ensure Hakoda, and future employees underpaid on the basis of sex and fighting the not-so-neutral employer defense of prior pay, can bring successful EPA claims and defeat such flawed affirmative defenses.

It is notable from the joint stipulation that there was not a robust salary negotiation process. Feng accepted the $125,000 offer on the table from Azula. That sum resulted from Kuei's assumption that Feng provided an accurate "ballpark" salary and an inference based on prior pay that he would only leave for a new position if he would receive at least $125,000 annually. R8, ¶ 17. The blatantly discriminatory scenario would be if Appa acted with animus to suppress Hakoda's wages while being willing to pay Feng much more. Even if Appa had no ill will behind the $14,500 pay gap based on Feng's former salary, it remains an unjustified harm that violates the Equal Pay Act. *See Peters v. Shreveport*, 818 F.2d 1148, 1153 (5th Cir. 1987) (describing how is intent becomes relevant in Title VII cases). Overall, Appa cannot meet its

burden of the "factor other than sex" affirmative defense to justify Feng and Hakoda's disparate salaries for equal work as Systems Engineers.

STANDARD OF REVIEW

The district court's decision to grant summary judgment is also reviewed *de novo*. *Davidson v. Glickman*, 169 F.3d 996, 998 (5th Cir. 1999). The appellate court views "the facts and inferences in the light most favorable to the nonmovant." *Id.* (citing *Hall v. Gillman, Inc.,* 81 F.3d 35, 36–37 (5th Cir. 1996)).

When the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(c); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmovant." *Piazza's Seafood World, LLC v. Odom,* 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

Applicant Details

First Name	**Margaret**
Last Name	**Larin**
Citizenship Status	**U. S. Citizen**
Email Address	**mlarin@umich.edu**
Address	**Address** Street **3641 Frederick Dr.** City **Ann Arbor** State/Territory **Michigan** Zip **48105** Country **United States**
Contact Phone Number	**7348347797**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McQuade, Barbara
bmcquade@umich.edu
734-763-3813

Caminker, Evan
caminker@umich.edu
734-764-5221

Osbeck, Mark
mosbeck@umich.edu
734-764-9337

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Maggie R. Larin

3641 Frederick Dr, Ann Arbor, MI 48105
(734) 834-7797 • mlarin@umich.edu
She/her/hers

June 23, 2023

The Honorable Stephanie Dawkins Davis
Theodore Levin United States Courthouse
231 W Lafayette Blvd
Detroit, MI 48226

Dear Judge Davis,

I am a rising third-year student at Michigan Law writing to apply for a clerkship in your chambers for the 2024-2025 term. As I grew up and went to school in Southeast Michigan, surrounded by my entire family, it would be an honor to stay in the area and work in your chambers.

I am especially interested in working in your chambers based on your commitment to community outreach and public service. Before law school, I had the opportunity to work at a middle school for low-income students, where we provided wrap-around care to set our students on track to reach their educational and career goals. I see my own passion for public service reflected in your work, especially in your volunteering for Alternatives for Girls. Further, I hope to pursue a future in federal and appellate public defense, and I am confident that working in your chambers would allow me to further my goals of improving my writing and advocacy while maintaining a passion for service.

Though I am applying to work in your chambers immediately after graduation, I will come in with significant experience in chambers and in litigation. Prior to law school, I interned for a summer with Judge Judith E. Levy, where I primarily summarized briefs and sentencing memos to assist the Judge. I then spent two years as a paralegal in a solo family law practice, where I worked on trials, drafted motions, and briefed a successful appeal. As a law student, I spent my first summer at the Oregon Federal Public Defender, where I wrote motions and briefs, primarily on habeas and extradition. As a second-year student, I participated in my school's Criminal Appellate Practice Clinic, where I prepared an appellate brief on a Michigan criminal case. This summer, I am working at the Colorado State Public Defender, where I appear on the record under the state's student practice rule and represent indigent clients at jury trials, hearings, and plea negotiations. I am hopeful that this combination of trial and appellate level experience will make me a valuable addition to your chambers. Thank you for your consideration.

Attached for your review are my resume, law school transcript, and two writing samples. I have also attached letters of recommendation from the following professors:

Professor Barbara McQuade, bmcquade@umich.edu, (734) 763-3813
Professor Evan Caminker, caminker@umich.edu, (734) 763-5221
Professor Mark K. Osbeck, mosbeck@umich.edu, (734) 764-9337

Sincerely,

Maggie Larin

Maggie R. Larin

3641 Frederick Dr, Ann Arbor, MI 48105
(734) 834-7797 • mlarin@umich.edu
She/her/hers

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2024
GPA: 3.814 (historical class rank letter attached)
Honors: Dean's Scholarship; Quarterfinalist – Campbell Moot Court Competition; Quarterfinalist – 1L Oral Advocacy Competition
Journals: Michigan Law Review, *Executive Production Editor*, Vol 122
Activities: Criminal Appellate Practice Clinic; Senior Judge (Legal Research and Writing Teaching Assistant); Sentence Commutation Project; Peer Tutor (Civil Procedure and Criminal Law)

UNIVERSITY OF MICHIGAN – ANN ARBOR — Ann Arbor, MI
Bachelor of Arts in Sociology, *High Honors and Highest Distinction* — Graduation April 2018
Honors: Phi Beta Kappa, Honors Thesis, Phi Kappa Phi, Angell Scholar, University Honors

EXPERIENCE

COLORADO STATE PUBLIC DEFENDER — Colorado Springs, CO
Summer Intern — Summer 2023

FEDERAL PUBLIC DEFENDER, DISTRICT OF OREGON — Portland, OR
Summer Law Clerk — June 2022 – August 2022

- Conducted legal research and drafted a memorandum on *Brady* discovery standards, a SUR-Reply Brief on jury instructions in a habeas matter, and several memoranda and motions for an international extradition
- Aided assistant federal public defenders and investigative team with jury selection at trial

THE LAW OFFICES OF JILL M. PETERS, LLC — Chicago, IL
Paralegal Specializing in Family Law — September 2019 – July 2021

- Drafted, prepared, and filed motions, subpoenas, and other court documents in Circuit and Appellate Courts
- Conducted interviews with clients, analyzed financial records, and researched case law as needed

ST. ANDREW NATIVITY SCHOOL (GRADES 6-8) – JVC NORTHWEST/AMERICORPS — Portland, OR
Graduate Support Assistant, Enrichment Teacher, and Study Hall Supervisor — August 2018 – July 2019

- Guided middle school students through the high school application process; provided support to alumni including those in high school, college, and the workforce

WASHTENAW COUNTY OFFICE OF THE PUBLIC DEFENDER — Ann Arbor, MI
Student Investigator — December 2016 – July 2017

- Interviewed clients in preparation for probable cause conferences and preliminary examinations
- Conducted conflict checks and guideline calculations to assist supervising attorney

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN — Ann Arbor, MI
Judicial Intern – Chambers of Judge Judith E. Levy — May 2016 – July 2016

- Summarized case materials, briefs, and reports for the Judge and her clerks
- Worked closely with the case manager to organize and update the Judge's docket

ADDITIONAL

Languages: Spanish (professional working proficiency)
Interests: international film and television, hiking, trivia

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

Rashida Y. Douglas
Registrar; Director
Office of Student Records, 300 Hutchins Hall
625 S. State Street, Ann Arbor, MI 48109-1215
Phone: 734.763.6499 | Fax: 734.936.1973
Email: lawrecords@umich.edu

Memo: 2018 - 2022 Class Ranking

To whom it may concern:

The University of Michigan Law School does not rank its current students; however, it does rank graduates upon completion of their degrees. As the GPAs that correspond to particular percentages do change slightly from year to year, we are providing averages for the graduating classes from the past five academic years (2018 - 2022). Thus, the following information may assist you in evaluating candidates:

-- Students with a cumulative GPA of 4.010 and above finished in the top 1%
-- Students with a cumulative GPA of 3.941 and above finished in the top 2%
-- Students with a cumulative GPA of 3.921 and above finished in the top 3%
-- Students with a cumulative GPA of 3.884 and above finished in the top 5%
-- Students with a cumulative GPA of 3.820 and above finished in the top 10%
-- Students with a cumulative GPA of 3.772 and above finished in the top 15%
-- Students with a cumulative GPA of 3.735 and above finished in the top 20%
-- Students with a cumulative GPA of 3.700 and above finished in the top 25%
-- Students with a cumulative GPA of 3.650 and above finished in the top 33%
-- Students with a cumulative GPA of 3.563 and above finished in the top 50%

During the Winter 2020 term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, the students who graduated in the May 2020 term graduated with five semesters of graded courses, rather than six.

Rashida Y. Douglas
Law School Registrar & Director for the Office of Student Records

Control No: E196732501 Issue Date: 05/31/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Larin,Margaret R
Student#: 53036083

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	001	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A-
LAW	520	002	Contracts	Daniel Crane	4.00	4.00	4.00	A-
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	A
LAW	593	004	Legal Practice Skills I	Mark Osbeck he-him-his	2.00		2.00	H
LAW	598	004	Legal Pract:Writing & Analysis	Mark Osbeck he-him-his	1.00		1.00	H
Term Total				**GPA: 3.800**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	530	001	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	540	002	Introduction to Constitutional Law	Evan Caminker	4.00	4.00	4.00	B+
LAW	594	004	Legal Practice Skills II	Mark Osbeck he-him-his	2.00		2.00	H
LAW	630	001	International Law	Gregory Fox	3.00	3.00	3.00	A
Term Total				**GPA: 3.745**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.773**		**23.00**	**28.00**	
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00		4.00	P
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	A-
LAW	731	002	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	875	001	Privacy, Tech & 4th Amendment	Evan Caminker	2.00	2.00	2.00	A+
Term Total				**GPA: 3.957**	**13.00**	**7.00**	**13.00**	
Cumulative Total				**GPA: 3.816**		**30.00**	**41.00**	

Continued next page >

Control No: E196732501 Issue Date: 05/31/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Larin,Margaret R
Student#: 53036083

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A-
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
LAW	927	001	Crim Appellate Practice	Michael Mittlestat Jason Eggert	3.00	3.00	3.00	A
LAW	928	001	Criminal Appel Pract Field	Michael Mittlestat Jason Eggert	1.00	1.00	1.00	A
Term Total				**GPA: 3.809**	**14.00**	**11.00**	**14.00**	
Cumulative Total				**GPA: 3.814**		**41.00**	**55.00**	
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/31/2023							
LAW	480	001	MDefenders Public Defender Training Institute (Part I)	Eve Primus	2.00			
LAW	681	001	First Amendment	Don Herzog	4.00			
LAW	793	001	Voting Rights / Election Law	Ellen Katz	3.00			
LAW	794	001	Senior Judge Seminar II	Ted Becker	2.00			
LAW	803	001	Advocacy for Underdogs	Andrew Buchsbaum	2.00			

Remarks:
24-Jul-2019 SPANISH PROFICIENCY

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Control No: E196732501 Issue Date: 05/31/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Larin,Margaret R
Student#: 53036083

University Registrar

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

Barbara L. McQuade
Professor from Practice

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Maggie Larin for a clerkship in your chambers. Maggie is a rising third-year student at the University of Michigan Law School, where she serves as the Executive Production Editor of the Michigan Law Review. She is an outstanding student, earning high grades in law school and Phi Beta Kappa honors as an undergraduate. Maggie aspires to a career as a public defender and seeks to clerk to prepare her for that important work.

I have had the pleasure of having Maggie as a student in two classes, first year Criminal Law and upper-level Advanced Criminal Procedure. Maggie is a kind and curious student who is unafraid to raise her hand and contribute to a conversation, even when the topic might be socially fraught. My classes included discussions of police shootings, sexual assault, and other sensitive matters, and I could always count on Maggie to participate when many other students fell silent. In a time when students sometimes shrink from contentious topics, I found Maggie's willingness to discuss these issues with civility and respect to be refreshing. This openness to ideas and viewpoints will serve Maggie well as a lawyer and a law clerk.

Before law school, Maggie had a variety of experiences that have prepared her well and given her the maturity that shines through in class. She interned for a U.S. district judge and for a public defender's office, giving her insights into the work of courts. Maggie spent a year working as a teacher and support assistant in a middle school, an experience that builds resilience and empathy. And she worked as a paralegal in a law firm for two years, giving her an appreciation for the real-world demands of practicing law. All of these experiences will help her thrive as a law clerk.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Maggie has the kinds of qualities that I would look for in a new hire—a strong intellect, an ability to work with others respectfully, and effective communication skills. Maggie possesses all of these qualities in abundance, which will make her a tremendous resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will get along with others, respect confidences, and perform every task with enthusiasm and excellence. I think Maggie is very well suited to succeed in this environment. She will be an able assistant to any judge who hires her as a clerk. She has the intellectual capacity to tackle and solve challenging legal problems, she can express her ideas effectively in writing, and she will be a delightful colleague.

For all of these reasons, I enthusiastically recommend Maggie Larin for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade
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UNIVERSITY OF MICHIGAN LAW
701 South State Street
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EVAN H. CAMINKER
Dean Emeritus & Branch Rickey Collegiate Professor of Law

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I enthusiastically support Maggie Larin's candidacy for a judicial clerkship. I'm confident she will be an excellent law clerk and a welcome addition to your chambers.

I am a particularly appropriate reference for Maggie, as I have assigned both her best and worst grades in her early stages of law school. I taught Maggie in first-year Constitutional Law (in which she earned a B+) and an upper-division seminar called Privacy, Technology, and the Fourth Amendment (in which she earned only the third A+ I've given in five years). Maggie was a frequent, astute, and provocative participant in class discussions in both courses.

In Constitutional Law, Maggie displayed strong and nuanced doctrinal chops both when cold-called and when volunteering. I also was impressed during our several conversations about the Supreme Court and judicial ethics, as she was considering writing an independent study research paper on the Chief Justice's potential role in policing or guiding his colleagues' recusal decisions (she ultimately decided to go in a different direction). I chalk up her exam score to an isolated bad day, as her performance significantly deviates from both my own assessment of her abilities and the rest of her grades.

I worked with Maggie closely and extensively in my Fourth Amendment seminar, which focuses on modern government surveillance technologies and practices. Maggie was the most active and illuminating contributor to class conversations. She particularly impressed me during an ongoing dialogue we had about the so-called Third Party Doctrine, according to which people are deemed sometimes to have waived privacy interests in date shared with third party providers or other companies. We had many engaging conversations about doctrinal nuances and their interactions with various theories of Fourth Amendment privacy and property, and I especially appreciated that her views deepened and morphed over time as we played with the doctrine in different settings. Although Maggie came to the class with a long-term interest in criminal defense work, she was never doctrinaire and she demonstrated an open-minded intellectual and lawyerly curiosity throughout the course. And her thesis paper, which addressed the under-explored implications of Third Party Doctrine for location-tracking cellphone apps, additionally highlighted Maggie's excellent writing skills. Her prose was clear, concise, and fluent; I have no doubts about her ability to draft excellent opinions, memos, and other work product.

Beyond her top-notch lawyering talents, Maggie is a delightful young woman. She is upbeat and lively, always giving off a friendly and warm vibe. She is clearly well liked by her peers, and I'm confident she'll wear extremely well in the context of a busy and high-pressure work environment.

In sum, Maggie would be an excellent addition to your chambers. I enthusiastically and confidently recommend her for this position.

Sincerely,

Evan H. Caminker

Evan Caminker - caminker@umich.edu - 734-764-5221

UNIVERSITY OF MICHIGAN LAW
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Mark K. Osbeck
Clinical Professor of Law

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

A former student of mine, Maggie Larin, is applying to serve as one of your law clerks, and she has asked me to prepare a letter of recommendation on her behalf. I am delighted to do so.

Ms. Larin was a student in my two-semester Legal Practice class at Michigan Law during the 2021-2022 school year. This class teaches first-year students the fundamentals of legal analysis, legal research, legal writing, oral argument, negotiation, and other skills related to the practice of law.

Ms. Larin was an excellent student—one of the two or three best in a class of about 40. She has very strong research and analytical skills. She is also a highly skilled writer and an excellent oral advocate. Ms. Larin expresses arguments clearly, and she demonstrates the ability to explain difficult concepts in a simple way. She is also very diligent in her work.

I met with Ms. Larin at length on several occasions during the class to discuss her work product. In these discussions, she impressed me both with a thorough understanding of the legal issues involved, as well as an ability to fairly evaluate both sides of an argument, while still forcefully articulating her position. That ability should prove to be a significant asset as a judicial clerk.

This past year I employed Ms. Larin as a teaching assistant. Ms. Larin has performed admirably in that role. She has worked hard, made herself readily available to the 1L's as a mentor and advisor, and has always been meticulous in grading student work.

Ms. Larin is also an amiable and sociable person. She seems strongly committed to career success as a lawyer, and she strikes me as a person of high character and integrity. In sum, I am confident that Ms. Larin will make an excellent judicial clerk, and I am pleased to recommend her most highly. Please do not hesitate to e-mail or call me if I can answer any questions you might have about Ms. Larin.

Sincerely,

/Mark K. Osbeck/

Mark K. Osbeck
Clinical Professor of Law

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Maggie R. Larin

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She/her/hers

Writing Sample

The attached paper was prepared for a Fall 2022 seminar entitled *Fourth Amendment, Privacy, and Technology*. This version has been primarily self-edited but reflects minor feedback on wording from Professor Evan Caminker. The topic was self-determined.

The Implications of *Carpenter* for Phone App Location Data

In *Carpenter v. United States*, the Supreme Court held that accessing 7 days of Cell-Site Location Information (CSLI) constituted a search under the Fourth Amendment.[1] The case arose under the Stored Communications Act, which requires electronic communications providers to turn over certain consumer data to law enforcement pursuant to an order or search warrant where necessary to investigate and stop criminal conduct.[2] The decision did not explicitly invalidate the relevant Stored Communications Act, meaning that the mechanism still exists for the police to request location data of types other than CSLI from service providers. The *Carpenter* court explicitly left this door open, focusing its narrow holding on CSLI data. However, the privacy implications of other sources of data, such as GPS data from phone apps, are just as concerning.

According to the Pew Research Center as of 2021, approximately 97% of Americans own some sort of cell phone, and 85% of Americans have *smartphones* specifically.[3] On average, phone users have about 25 apps on their phones that they use regularly.[4] The New York Times reported in 2018 that as many as 200 million smartphones were sharing location data with these apps, noting that the sample of the data reviewed by The Times "reveals people's travels in startling detail, accurate to within a few yards and in some cases updated more than 14,000 times a day."[5]

[1] *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
[2] 18 U.S.C. § 2703.
[3] Pew Research Center, *Mobile Fact Sheet* (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/.
[4] Sidney Fussell, *The Most Important Things to Know About Apps That Track Your Location*, Time.com (Sept. 1, 2022, 2:13PM) https://time.com/6209991/apps-collecting-personal-data/.
[5] Jennifer Valentino-Devries, Natasha Singer, Michael H. Keller, & Aaron Krolik, *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, NYTimes.com (Dec. 10, 2018), https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html

For many location-tracking apps, the reasonable user understands that they are sharing their location for the effectiveness of the service. In order to call a ride on Uber, the app needs to know your location relative to cars nearby so that it can match you with a driver, provide that driver with directions to your location and destination, and calculate your fare. For some dating apps, prospective partners are suggested to users based on their relative locations. This, too, is a reasonable use of location information; it is only so helpful for a dating service to make matches between individuals who live hundreds of miles apart. Physically active users may choose to share their location with a fitness app so that they can keep more accurate records of their training and exercise. Although atlases are still available for purchase and driving directions can still be printed from a desktop computer, digital navigation systems are usually more user friendly, and many drivers use cell phone apps like Google Maps, Apple Maps, or Waze rather than a built-in navigation system. All of these apps, and many more that seem less obvious, keep records of the user's location while using their services. Many apps even collect location data in the background, while the user is *not* actively using the services of the app. This means that app providers are collecting massive amounts of location data from their users, and because it is mostly collected as GPS data, it is even more precise than the records reviewed by the *Carpenter* court.

Like CSLI data, cell phone GPS data could fall under the reach of the Stored Communications Act, or any similar state law, but unlike CSLI, there are no specific prohibitions on the government requesting such data. The lack of limitations on accessing this data is even more concerning in light of an Associated Press news report from September of 2022 that police agencies have been using a tracking tool that accesses cell phone GPS data (that has been sold to

independent companies) for criminal investigation purposes.[6] By limiting its holding to CSLI, the *Carpenter* court leaves police and lower courts with the question of how to consider other location data. In light of the doctrinal background the Supreme Court has developed to determine what defines a search under the Fourth Amendment, this paper will apply the *Carpenter* factors to cell phone app data and propose a new doctrinal test specifically for determining the voluntariness of location data conveyed to phone app service providers. Under this new test, the Court should consider both the necessity of the app to a reasonable person at the time of the requested data and the necessity of sharing location data with the app for its effective use. Additional factors, such as any relevant unique characteristics of the suspect, any manifestations of subjective intent to protect privacy by the suspect, and the amount of data requested should also be considered. Under this standard, the Court could provide additional guidance to lower courts and law enforcement while still protecting individual rights in a digital age.

I. Doctrinal Background: What is a search?

The dominant definition of a Fourth Amendment search comes from Justice Harlan's concurrence in *Katz v. United States*, where he wrote, "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[7] This rule has been upheld in the decades since and has been particularly essential to jurisprudence surrounding digital surveillance. Prior to *Katz*, Courts focused on physical intrusions and trespass as the basis for Fourth Amendment

[6] Garance Burke & Jason Dearen, *Tech tool offers police 'mass surveillance on a budget,'* APNews.com (Sept. 2, 2022), https://apnews.com/article/technology-police-government-surveillance-d395409ef5a8c6c3f6cdab5b1d0e27ef.
[7] *Katz v. United States*, 389 U.S. 347, 361 (1967).

searches.[8] The trespass test is not entirely in the past; the Supreme Court revived the test when it held that placing a GPS tracker on a car constituted a search due to the intrusion on private property.[9] The majority of cases involving digital surveillance, however, are decided according to the *Katz* reasonable expectation of privacy test.

One of the corollaries to the *Katz* test, in determining whether the expectation of privacy is one society is prepared to recognize as reasonable, is the third-party doctrine. This doctrine originated in the context of criminal informants, where courts determined that an individual cannot claim to have an expectation of privacy in information voluntarily conveyed to a third party.[10] The Court later applied this reasoning to business records. The Court found that the police could require that a bank turn over a suspect's account records in *United States v. Miller*.[11] Then, in *Smith v. Maryland*, the Court held that police use of a pen register to determine which phone numbers an individual had dialed was not a search, as the numbers were voluntarily conveyed to the phone company.[12] For decades, these cases gave police the nearly unfettered ability to request suspects' records on the basis that they had been voluntarily shared with a business or service provider. The logical conclusion would have been to extend this rationale to cell phone records as well.

Instead, "*Carpenter* signal[ed] the end of the third-party as traditionally understood."[13] Rather than categorically excluding from Fourth Amendment consideration any information conveyed to another, the Court considered both the inherent privacy of the data involved and

[8] *See, e.g.*, *Silverman v. United States*, 365 U.S. 505 (1961) (holding that because a microphone used to eavesdrop on the defendant physically encroached upon his private property, a search took place).
[9] *United States v. Jones*, 565 U.S. 400 (2012).
[10] *See On Lee v. United States*, 343 U.S. 747 (1952).
[11] United States v. Miller, 425 U.S. 435 (1976).
[12] *Smith v. Maryland*, 442 U.S. 735 (1979).
[13] Andrew Guthrie Ferguson, *Future-Proofing the Fourth Amendment*, Harv. L. Rev. Blog, (June 25, 2018), https://blog.harvardlawreview.org/future-proofing-the-fourth-amendment/.

whether the disclosure of that information was truly voluntary. In his majority opinion, Chief Justice Roberts wrote that "carrying [a cell phone] is indispensable to participation in modern society."[14] Further, he noted that CSLI data can be generated without any additional affirmative act by the user beyond turning on the phone, which added a second layer of involuntariness to the disclosure.[15] This nuanced focus on voluntariness echoed Justice Marshall's dissent in *Smith*, where he argued that any assumption of risk analysis requires "some notion of choice."[16] In his view, Smith had "no realistic alternative," because "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."[17]

The Court's focus on the unique sensitivity of cell-phone location data also echoed past Fourth Amendment opinions, bringing them into the majority framework. In his majority opinion, Chief Justice Roberts notes that "mapping a cell phone's location over the course of [many] days provides an all-encompassing record of the holder's whereabouts."[18] He goes so far as to call access to CSLI "near-perfect surveillance, as if [the government] had attached an ankle monitor to the phone's user."[19]

This isn't the first time the Court has raised concerns about the intrusiveness of an individual's location data. In *Jones*, although the majority decided the case on a trespass theory, concurrences by both Justice Sotomayor and Justice Alito note the unique sensitivity of location data. Justice Sotomayor's concurrence highlights that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail" about that

[14] *Carpenter*, 138 S. Ct. at 2220.
[15] *Id.*
[16] *Smith*, 442 U.S. at 749.
[17] *Id.* at 750.
[18] *Carpenter*, 138 S. Ct. at 2217.
[19] *Id.*

person's private affairs.[20] Justice Alito similarly worried about the comprehensiveness of the data but also the ease in which it can be gathered, and foreshadowed the questions raised by *Carpenter*, noting that cell phone searches could be even more precise and generate more data than putting a GPS tracker on a car.[21] Justice Roberts cited to both Justices' *Jones* concurrences in his *Carpenter* majority opinion, suggesting a movement among the Court to consider the location data as uniquely deserving of protection.[22]

This doctrinal background leaves open the Fourth Amendment's application to GPS location data collected by cellphone app and web service providers. A simplified analysis of *Carpenter* may lead to the conclusion that any collection of long-term location data from a service provider constitutes a search requiring a warrant. The Court's insistence on a narrow holding focused specifically on location data, however, necessitates a more nuanced analysis of the *Carpenter* court's reasoning and a new doctrinal test.

II. Application of *Carpenter* to Cell Phone App GPS Data

The *Carpenter* court primarily considered two factors in its analysis of CSLI. These factors were invasiveness[23] and voluntariness.[24] Factual differences between CSLI and GPS data are most relevant to these factors in the search analysis. Additional factors, such as whether the method of surveillance evades traditional checks on police power and whether the data can be

[20] *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring).
[21] *Id.* at 428 (Alito, J., concurring).
[22] 138 S. Ct. at 2215, 2217-18.
[23] The Court highlighted two factors indicating CSLI was too invasive: (1) because individuals always carry their phones with them, the data is all-encompassing, (2) the data can be retrospectively mined for years into the future. 138 S. Ct. at 2218.
[24] The Court declined to apply the third-party cases, noting that the voluntariness rationale could not apply equally to cell phone data, due to their pervasiveness and the lack of action required by the user to generate CSLI. 138 S. Ct. at 2220.

accessed retroactively, are nearly the same for CSLI data and cell phone GPS data, and thus support the argument that Carpenter should extend to cell phone GPS data.

A. Invasiveness

Cell phone GPS data raises more serious invasiveness concerns than CSLI. Despite the *Carpenter* majority's claims that the location data gathered by CSLI is as accurate as attaching an "ankle monitor"[25] to the suspect, this claim dramatically overstates the precision of CSLI.[26] Rather than pinpointing an individual's precise location, CSLI merely provides a record of the nearest cell tower when a particular signal pinged off them, allowing for the deduction of a service range.[27] The actual precision of this data depends on the density of cell towers in a particular area.[28] For urban areas, towers can be more concentrated, so locations can be as precise as several city blocks, but in rural areas, CSLI can provide results spanning miles.[29] Further, CSLI doesn't provide any relative strength comparison, so it cannot pinpoint an individual's location inside the range of nearby towers.

By comparison, phone GPS data is extremely precise. Rather than providing a general range of an individual's location at a given time, GPS is satellite-generated[30] and provides exact coordinates, which tend to be accurate from 3-20 meters.[31] Google claims that its GPS estimates are accurate within 20 meters, compared to up to a few thousand meters for cell tower location data (CSLI).[32] A 2019 study determined that for an Apple iPhone 6, the GPS was accurate within

[25] *Carpenter*, 138 S. Ct. at 2218.
[26] Caminker, Evan H., *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, Sup. Ct. Rev. 2018 (2019): 431–32.
[27] *Id.* at 431.
[28] *Id.*
[29] *Id.*
[30] Garmin, *What is GPS?*, garmin.com, https://www.garmin.com/en-US/aboutgps/
[31] *Id.*
[32] Google Maps Help, *How Maps Finds Your Current Location*, support.google.com Help Center, https://support.google.com/maps/answer/2839911?hl=en&co=GENIE.Platform%3DiOS

7-13 meters.[33] As iPhones and other smart phones have developed and updated, the GPS accuracies of various models have increased. The most recent model of the iPhone, the iPhone 14 Pro, includes "precision dual-frequency GPS,"[34] which claims to give users access to the most precise GPS technology in civilian usage.[35] Based on the direction phone GPS is headed, it is currently and will continue to be significantly more precise than CSLI data. This means it poses a much greater problem in terms of its invasiveness. If the Court believed CSLI was enough to be an "ankle monitor," cell phone GPS is even more concerning. Justice Alito signaled an awareness of this coming concern in his *Jones* concurrence, noting that "Cell phone and other wireless devices now permit wireless carriers to track and record the location of users."[36] He emphasized the difference in accuracy, stating, "For older phones, the accuracy of the location information depends on the density of the tower network, but new 'smart phones' which are equipped with a GPS device, permit more precise tracking."[37] Just as Alito suggests, phone GPS data is more concerning than is CSLI for its invasiveness due to its precision.

The other concern of the Court was that the invasiveness of CSLI data was so high because it tracked any movement where an individual carried their cell phone.[38] The same concern applies to app GPS data. If a user does not manually disable location tracking on their device (a question which will be relevant in the subsequent discussion of voluntariness), an app can collect location data on the individual at any moment that their phone is on. Even if a user

[33] Krista Merry & Pete Bettinger, *Smartphone GPS Accuracy Study in an Urban Environment*, 14 PLoS ONE 7 (2019), https://doi.org/10.1371/journal.pone.0219890.
[34] Apple, *iPhone 14 Pro Tech Specs*, apple.com, https://www.apple.com/iphone-14-pro/specs/.
[35] Joe Rossignol, *iPhone 14 Pro Models Feature Improved GPS Accuracy*, MacRumors, *Blog* (Sept. 10, 2022), https://www.macrumors.com/2022/09/10/iphone-14-pro-dual-frequency-gps/.
[36] *Jones*, 565 U.S. at 428 (Alito, J., concurring).
[37] *Id.*
[38] *Carpenter*, 138 S. Ct. at 2220 ("Virtually any activity on the phone generates CSLI....Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.").

only enables location tracking while the app is in use (a common alternative to constant tracking), certain apps may be running consistently in the background, so an app could ultimately collect just as comprehensive a record of location as CSLI data.

This comprehensiveness, and the fact that it can include location data while a user is home rather than only on public roads, is part of why a *Carpenter* analysis is more appropriate for phone GPS cases than an analysis along the *United States v. Knotts* or *United States v. Karo* line of cases. In *Knotts* and *Karo*, the Court determined that placing a GPS tracker in a container that was placed in a car in order to track the car's movements did not constitute a search, so long as the data collected did not provide any information about the interior of a home.[39] *Knotts* and *Karo* applied the plain view doctrine in combination with the automobile warrant exception, which stands for the premise that individuals have no reasonable expectation of privacy on public roads.[40] *Carpenter* chose not to apply this reasoning to CSLI because it was both so comprehensive and unlike a GPS tracker in a car, it could go beyond public thoroughfares.[41] On a spectrum between the invasiveness of *Knotts* or *Karo* surveillance and a *Carpenter* search, phone GPS data is more closely analogous to *Carpenter* due to its comprehensiveness and its lack of distinction between public and private spaces.

Therefore, because the location data is more precise, nearly as comprehensive, and similarly provides information about an individual in their own home, the intrusiveness of cell phone GPS data is at least as concerning as CSLI.

B. Voluntariness

[39] *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 460 U.S. 276 (183).
[40] *Karo*, 460 U.S. at 713–14 ("The [*Knotts*] Court held that since the movements of the automobile and the arrival of the can containing the beeper in the area of the cabin could have been observed by the naked eye, no Fourth Amendment violation was committed by monitoring the beeper during the trip [on public roads].")
[41] *Carpenter*, 138 S. Ct. at 2218–20.

Surprisingly, the *Carpenter* court did not mechanically apply the third-party doctrine of *Smith* and *Miller* in determining whether CSLI data constituted a search. The dissents, especially Justice Kennedy's, were concerned about this analysis, as the third-party doctrine seemed to control.[42] Kennedy pointed out that although it may be true that the ubiquity and necessity of cell phones to modern life limit the true voluntariness of their use, the same concerns could have applied to *Smith* and *Miller* regarding the necessity of using telephones and banks.[43] But the majority chose not to distinguish these cases. Rather, the Court focused on the requirement that information under the third-party doctrine be voluntarily conveyed, emphasizing that cell phones are "such a pervasive and insistent part of daily life" that their use is not truly voluntary.[44] Further, the Court was concerned with the fact that CSLI data was generated automatically, regardless of any actions by the user.[45] As long as the phone was on and connected to the cellular network, there was always a risk that CSLI could be gathered. For these two reasons—necessity and lack of affirmative user action—the Court chose not to apply the third-party doctrine to CSLI.

Despite claims that *Carpenter* effectively destroyed the third-party doctrine,[46] there is still a need to reconcile phone GPS data with the voluntariness question from *Smith* and *Miller* (which *Carpenter* affirmatively did not overturn) in order to determine the Fourth Amendment's applicability to the data. Here is where the two types of data have the greatest divergence. Where

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[42] *Carpenter*, 138 S. Ct. at 2231 (Kennedy, J., dissenting) ("Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.").
[43] *Id.* at 2232 (Kennedy, J., dissenting) ("financial records and telephone records do 'revea[l] . . . personal affairs, opinions, habits and associations.') (quoting *Miller*, 425 U.S. at 451 (Brennan, J., dissenting) and citing *Smith*, 442 U.S. at 751 (Marshall, J., dissenting)).
[44] *Id.* at 2220 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).
[45] *Id.*
[46] Andrew Guthrie Ferguson, *Future-Proofing the Fourth Amendment*, Harv. L. Rev. Blog, (June 25, 2018), https://blog.harvardlawreview.org/future-proofing-the-fourth-amendment/.

carrying a phone may be a necessity and thus involuntary—and there could even be room for disagreement with this essential premise of *Carpenter*—it is an entirely different question whether having location-tracking apps on that phone are necessary. Currently, no test exists in Supreme Court analysis for determining voluntariness under the third-party doctrine. To fill that gap, this paper suggests a new 2-prong test, taken in light of the circumstances: first, is the service provided by the app essential to twenty-first century life? Second, is enabling location data essential to the efficient functioning of the service? Under this test, there will be four categories of app data: first, data from an app that is essential and requires location sharing for its effectiveness; second, data from an app that is essential, but location data is not required for the effective use of the app; third, data from an app that is not essential, but requires location sharing for effective use; and fourth, data from an unnecessary app that does not require location data for effective use. Each of these categories should be subject to different levels of Fourth Amendment protections.

As previously noted, critics could take issue with the premise in *Carpenter* that a cell phone is ever truly necessary to such an extent that its use is involuntary. In a *literal* sense, it is possible to live without a cell phone or without a smart phone. There are presumably areas of the world without developed service networks, and costs can be a huge barrier to many in obtaining cell phones and smart phones. There are also likely generational gaps in the ideology regarding the need to be always accessible to others. In this way, *Carpenter* may be based on a flawed presumption that one cannot reasonably live without a phone. But the *Carpenter* court's acknowledgement that cell phone use is so pervasive, and that the world has become more and more reliant on phones, recognizes that despite a theoretical world in which phones are unnecessary, the reality for most Americans in the twenty-first century is that phones are an

inherent part of life. In assessing voluntariness for phone apps, this paper will embrace some degree of the *Carpenter* court's rationale. In a *literal* sense, no phone app is truly necessary. Even phone apps that connect to life-saving digital health technologies likely have analog equivalents or at least digital equivalents that do not require a cell phone. However, just as the *Carpenter* court implicitly recognized, one should not have to entirely disconnect from modern technology in order to protect their own privacy. Some amount of choice will be implicit in the decision to add an app to a cell phone. The analysis in this paper will distinguish, however, those apps that are so ingrained in modern society and culture that they are inherent to the use of a cell phone, from those apps that merely add some convenience, fun, or information for a user but do not provide an essential function.

As for the second prong—whether the sharing of location data is necessary for the effective use of the app—this analysis too could be subjective but will hinge on whether the app can be used with *all* location settings turned off (as opposed to using the setting "only on while using app") with enough effectiveness that the app is not rendered useless. If there is no marked benefit to using an app without its location services enabled, then the location tracking is necessary for the effective use of the app. If the app functions exactly the same regardless of the use of location data, then it is unnecessary to enable location sharing. Many apps likely fall somewhere in the middle of this spectrum, but the below analysis and illustrations of the two-prong test should help to clarify how to apply such a standard to cell phone GPS data.

1. *Category A: Service Essential and Location Necessary*

The first category of phone apps requires the greatest amount of protection under the Fourth Amendment. These apps are those that are most necessary to daily life in the twenty-first century that also require sharing of location data for their effectiveness. The most prototypical

essential service that requires location sharing is navigation. This includes apps like Google Maps, Apple Maps, and Waze. These apps are essential not because no alternatives exist—there are always atlases, printed directions from MapQuest or another desktop service, or vehicle GPS devices—but the development of navigation apps for phones allow for more precise directions, especially in emergency situations where pre-planning of routes is impossible. Cell phone navigation further allows a user to navigate while walking, biking, or running, which are not possible through the use of vehicle navigation systems.

Once again, it is *possible* to function without GPS navigation apps, but immediate access to directions from nearly anywhere in the world regardless of the mode of transportation has become such an ingrained part of modern society, that it cannot reasonably be considered "voluntary." The same is true for the necessity of enabling location data for the use of the navigation app. These apps technically can be used without enabling location sharing. This would look essentially the same as using an app or printing directions on MapQuest. Rather than sharing their precise location, a user would input a starting location and an ending location and receive directions to the destination. However, use of the app in this way strips the app of its benefits over the non-phone alternatives. Without sharing data, the user cannot get turn-by-turn instructions, estimates on the distance and time remaining in a trip, traffic and accident updates, or most significantly, the ability to navigate from an unknown location in an emergency. Therefore, not only is the app itself necessary, but the location sharing with the app is also necessary.

For services like these, users should be granted significant protections, as these present voluntariness concerns closest to those in *Carpenter*. Where there is no real choice in the

decision to share location data with a service provider, the third-party doctrine should not apply. For apps in this category, any request for GPS location data is a search requiring a warrant.

2. *Category B: Service Essential and Location Unnecessary*

There are also certain essential services which do not require location sharing for the effective use of the service. These are services that are almost universally used, but for which location data is merely tangential. Services such as these likely collect location data in order to tailor advertising, sell metadata about their users, and on occasion, provide minimal benefits to users. Of the larger category of essential apps, these are likely more common.

An example of an essential app that does not require location data is a standard internet browser or search engine, like Google Chrome, Safari, or Firefox. The use of the internet on a cell phone is one of its most essential functions. All smartphones come with a browser pre-installed, and even without adding any apps, mobile browsers contain the capabilities of most other apps, making them more essential than most third-party apps on that basis alone. Because the use of mobile browsers is so intertwined with any use of a cell phone, their use can hardly be considered voluntary. Especially where the app comes pre-downloaded on the user's phone, the download of the app was not voluntary in fact, even if the use of it involves some amount of choice. But for apps like these, where the service is so deeply intertwined with the actual use of a phone, the app itself is essential.

However, location sharing with these apps is so marginally useful to users that the decision to do so cuts against any claim of involuntary disclosure. The benefits of sharing data with a web browser are limited. Search results may be slightly tailored by location or recommendations could be based on businesses in the area. For shopping within a mobile browser, shipping or stock estimates may change based on the user's location. However, all of

these benefits can equally be attained by entering general location information (such as the user's city, neighborhood, or zip code) in the content of the search or on a store website, without sharing precise location data at all times. Because a mobile browser can be functionally used without sharing access to the user's precise location, this type of data falls within Category B.

Category B data deserves some level of protection, but because it is more voluntarily conveyed than the data in Category A, it should not receive the same categorical distinction of a search. Rather, for requests of GPS records from essential apps where location data is unnecessary, there should be a rebuttable presumption that such a request is a search requiring a warrant. To overcome this presumption, the government can point to additional factors which will be discussed more below, including the user's subjective intent to (or not to) protect the privacy of their location data or the reasonableness of their expectation of privacy. In the absence of factors suggesting otherwise, however, requests for Category B data will constitute a search due to the necessity of the app.

3. *Category C: Service Non-Essential but Location Necessary*

A third category of cell phone apps includes those apps that are not necessary for modern life, but when used, they do require location data to be effective. While many apps may fall into this category, one clear example is that of dating apps. The specific styles of all dating apps vary, with some like the app Hinge allowing their users to manually input a neighborhood rather than sharing their precise location with the service. However, most dating apps, including three of the most popular services (Tinder, Bumble, and Grindr), use the member's precise location to connect them to other users in the same geographical area. These services require location data, as the main purpose of these types of dating apps is to meet others *nearby*. Bumble even has two alternative platforms, Bumble BFF(for making new friends) and Bumble Bizz (for networking),

which are often used by people who have just moved to a new location hoping to establish a personal or professional network. For these apps, location is such an essential part of the service that it isn't truly voluntary to turn it on while using the app.

However, it is difficult to make a persuasive argument that the app is necessary or essential in the first place. While many smart phone users do use dating apps,[47] and relationships could be considered an essential part of modern life, dating apps are hardly an essential route for making those relationships. Some users may see them as essential (or at least beneficial)[48] but many others view them as unnecessary,[49] or even as categorically bad for relationship-building.[50] Because there is such a lack of consensus about their value in modern society, it would be unreasonable to classify them as essential according to this two-prong framework.

Another example of a type of app that might not be essential but requires location sharing to be worth using is any fitness tracker, specifically for tracking outdoor exercise. Garmin, Nike, and Strata all provide detailed GPS tracking for runners, bikers, or hikers looking to keep track of their fitness goals, progress, and distance. For these apps, location sharing is a necessity. Rather than trusting algorithms and estimates that calculate distance based on the timing of the user's stride or health metrics, GPS trackers provide precise analysis of an individual's movements in the real world. There is certainly value added to a fitness tracker by enabling GPS for its use, so it should be considered necessary for the functioning of the app.

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[47] According to Forbes, Tinder ranked third globally for consumer spending in 2022, ahead of Disney+ and HBO Max. John Koetsier, *Top Apps Of 2022 By Installs, Spend, And Active Users: Report*, Forbes.com (Mar. 23, 2022, 7:32PM), https://www.forbes.com/sites/johnkoetsier/2022/03/23/top-apps-of-2022-by-installs-spend-and-active-users-report/?sh=d93d44d3acf0.
[48] Sarah Wells, *Study Reveals Unexpected Benefits of Dating Apps*, Inverse.com (Dec. 30, 2020), https://www.inverse.com/innovation/the-science-of-dating-apps
[49] Kirstie Taylor, *A Guide to Dating Without Dating Apps*, Medium.com (Jan. 13, 2020), https://medium.com/mind-cafe/a-guide-to-dating-without-dating-apps-b52a09adea26
[50] Jon Birger, *Why Dating Apps Are No Way to Find True Love*, Newsweek Magazine (Feb. 2, 2021, 7:00AM), https://www.newsweek.com/why-dating-apps-are-no-way-find-true-love-1565682.

However, like dating apps, it would be inaccurate to say that fitness trackers are essential to modern life. Many phone users do not use fitness trackers with GPS functioning. While exercise is a necessity for good health, plenty of forms of exercise do not require the type of analysis that these fitness trackers provide. Therefore, it is unlikely that a reasonable person would classify these apps as essential, even if they play a large role in the lives of those who do use them.

Without a more universal acceptance that fitness trackers or dating apps are essential, the use of such apps should be considered more voluntary than the use of Category A or B apps. However, the necessity of the GPS data to the function of the app cuts slightly against voluntariness. Therefore, requests of Category C data should carry a rebuttable presumption that the request is *not* a search. Like Category B requests, the presumption can be overcome in light of special circumstances or evidence of the user's subjective privacy practices. However, without additional evidence suggesting otherwise, a request for data from a non-essential app requiring location data would not constitute a search under the Fourth Amendment.

4. *Category D: Service Non-Essential and Location Unnecessary*

The fourth and final category of apps under this new framework is the category of apps that are non-essential to modern life for which sharing location data is unnecessary to the functioning of the app. An example of a Category D app would be a phone game, such as Candy Crush[51] or Angry Birds.[52] These apps, while entertaining and helpful in situations of great boredom, are hardly essential. However, these apps are among the largest collectors of location

[51] Dylan Carter, *Data hungry: Which mobile games collect the most personal info?*, The Brussels Times (June 13, 2022), https://www.brusselstimes.com/237790/data-hungry-which-mobile-games-collect-the-most-personal-info.
[52] Kaitlyn Tiffany, *Angry Birds and the End of Privacy*, Vox (May 14, 2019, 8:36AM), https://www.vox.com/explainers/2019/5/7/18273355/angry-birds-phone-games-data-collection-candy-crush.

metadata for use in advertisements. Like mobile browsers, there is no marked benefit to users to allow the apps to access their location. But unlike mobile browsers, there is little benefit to users to have the app at all. For this reason, these Category D apps require the lowest level of Fourth Amendment protection.

One concern that applies to all four categories of data is that even if a user understands that they are voluntarily using the service, they might be less aware that they are sharing their location for services like those in Categories B and D, where the location data is so marginal to the use of the product. While this awareness should be a factor in the Category B analysis, since those apps are essential, an individual's knowledge of sharing their location with a Category D app should not be considered unless the individual can make an affirmative showing that they were never presented with an option to opt out of such tracking. Even if such a showing is made, the app should then be reviewed under a Category C standard, not automatically be considered a search. By contrast, where a user voluntarily downloaded and shared their location with a Category D app, a request for that app's location data should *not* constitute a search under the Fourth Amendment.

5. *The Social Media Question – How to Classify?*

One category of apps that can be challenging to classify is that of social media apps. These apps, including Facebook, Twitter, Instagram, Snapchat, and TikTok are consistently among the most downloaded and most-used apps in the world.[53] Despite any legitimate concerns about the effects of social media on individuals that would push against classification as necessary, social media use is so ingrained in daily life, that to consider them non-essential would completely disregard the reality that for many, social media is as necessary, if not more

[53] *Koetsier*, *supra* note 47.

so, to having a cell phone as being able to make calls is. Both the *Carpenter* and *Riley* courts considered phones unique because of their pervasiveness.[54] Such pervasiveness suggests that social media apps would satisfy the first prong of the 2-part test: essential to modern society.

Social media apps are also among the most obvious collectors of location data. Instagram allows users to tag their location to their posts, using GPS data to precisely identify the city, neighborhood, or even business establishment where a photo was taken. Snapchat gives users the ability to share their location with their contacts, showing approximately where each user is on a map of the world (it can even indicate if a user is travelling or did so recently). Facebook recommends social events by other users in the area. However, these uses of location data are not as essential to the services, which would cut in favor of classifying social media apps into Category B. This would mean social media app location data falls under the rebuttable presumption of Fourth Amendment protection.

III. Additional Factors – Special Circumstances, Subjective Intent, and Amount of Data

For those apps that fall into Categories B and C, the rebuttable presumptions in either direction may be overcome upon a clear showing of enough relevant factors to indicate that a request should or should not be considered a search. This section will address some of these relevant factors for this analysis.

A. Special Circumstances

Among the factors a court should consider in applying this two-pronged test is whether an individual's special circumstances make either the use of an app or the sharing of location data with that app more essential than average. In particular, these functions may be more

[54] *Carpenter*, 138 S. Ct. at 2220 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

necessary for individuals with disabilities, seniors, and children. For example, location sharing may be more necessary for individuals with caretakers. A parent may require a child to share their location on "Find My Friends" with them to ensure their safety. A blind adult may require the use of GPS for navigation beyond simply needing directions. A senior, or someone with significant health concerns, might choose to enable health apps that include GPS data to allow for faster aid in an emergency. These types of unique situations should increase the degree of Fourth Amendment protections over an individual's data, either making the service itself essential, making the sharing of location data necessary, or both. In effect, this would presumptively place the data for all individuals presenting these special circumstances in either Category A, B, or C. Therefore, none of their data could automatically be exempted from the reach of the Fourth Amendment.

B. Manifestations of Subjective Intent to Protect Privacy

A second set of factors a court should consider in assessing Category B and C apps is whether within the app or within the user's other apps, they manifest any subjective intent to protect their privacy. In *Katz*, Justice Harlan emphasized in his creation of the reasonable expectation of privacy test the "critical fact" that Katz shut the door behind him, which Harlan saw as manifesting a temporary "freedom from intrusion" that was reasonable.[55] Several actions by users could similarly represent "shutting the door" to outside intrusion that may strengthen an individual's claim to a privacy interest over their location data.

First, many iPhone apps allow a user to choose between three options when sharing location data. These settings are: Always, Only While Using, and Never. Clearly, selecting "Never" is the most privacy protective. If an individual has actively selected Never, the app

[55] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

should not be collecting any data and any data it does collect should not be accessed by the government, as the third-party doctrine does not apply to data involuntarily shared with a third party.

If the user's setting is "Always," they are manifesting the least interest in protecting the privacy of their data. Especially for Category B apps, where location is not necessary to the functioning of an app, a selection of "Always" can cut against Fourth Amendment protection, since it suggests that regardless of the necessity of the app itself, the individual is not concerned with the sensitivity of their location data. Selection of "Always" on a Category C app is still relevant, but less so, as Category C apps require location sharing for their effectiveness. Therefore, the use of continuous location sharing for these apps is less indicative of the user's subjective intent.

Finally, an individual's choice to limit their location sharing to "Only While Using" should cut towards a greater privacy interest, especially for those apps in Category B that are essential. Even limiting the amount of location data sent to Category C suggests an increased interest in protecting privacy despite sharing data with a non-essential app. Therefore, in terms of an individual's subjective intent, this choice should support an individual's claim of Fourth Amendment protection.

Where information from several apps is being requested, particularly where the apps are in Categories B and C, the user's data sharing preferences should factor in for all the apps being requested. For example, if a person selects "Only While Using" for a social media app (Category B) but "Always" for a dating app (Category C), that would be less indicative of a subjective intent to protect privacy than the inverse scenario, always sharing location with Category B apps but only sharing location with Category C apps while using them.

Some could see the choice to only share data while using the app as *less* deserving of privacy protections than choosing to *always* share location. Under this reasoning, the comprehensiveness concern in *Carpenter* is less prevalent in data that is only being gathered while the user is actively on the app, rather than at all times. An app that always collects location data is more similar to CSLI data, which did not require affirmative action on behalf of the user to gather location points. However, this perspective underestimates the vast amount of data that can still be collected only while an app is in use, especially considering many apps continue to run and collect data in the background of other apps. "While in use" is likely not as great of a limitation as most users might believe it is. But because of that belief of privacy protection, the selection of this location setting can still inform the court as to an individual's subjective intent.

C. Amount of Data Requested

The *Carpenter* court limited its holding to apply the Fourth Amendment to requests for CSLI for 7 days or more.[56] While any request for Category A app data requires a warrant, and no request for Category D app data requires a warrant, the amount of data requested could inform the determination of whether a Category B or C request requires a warrant. Using *Carpenter* as a baseline, if less than seven days of data are requested, there is less of a need for a warrant. However, if more than seven days of data are requested, there is a greater need for a warrant. This balancing on its own could overcome either rebuttable presumption.

Another measurement of amount of data, however, could be the number of apps requested. For each app requested, the need for a warrant increases. This is because the more apps that get requested, the more comprehensive the data will be in its records of an individual's location at a given time. This is especially a problem if the requests are all for the same period,

[56] *See Carpenter*, 138 S. Ct. at 2224 ("The Court further concludes that...the Government needed to get a warrant to obtain more than six days of cell-site records.") (Kennedy, J., dissenting).

because such a series of requests indicates that the government intends to use them in tandem and create a more all-encompassing map of an individual's locations—one of the core concerns of *Carpenter*.

Courts should similarly be wary of staggering requests, i.e., a 6-day request to Snapchat for September 1 to 6, a 6-day request to Nike Run for September 7 to 12, and a 6-day request to Instagram for September 13 to 18. A series of requests like this displays gamesmanship to avoid the Fourth Amendment. The government should not be allowed to make such efforts to avoid the warrant requirement. In order to close these possible loopholes, courts should consider both the time range of the requested data and the number of apps being requested in its determination of the warrant requirement for Category B and C apps.

IV. Conclusion

Carpenter was revolutionary in the way it encompassed social realities in its assessment of the *Katz* reasonable expectation of privacy. It left questions open, however, in the future of the third-party doctrine and the privacy protections applicable to future technologies. This paper sought to address some of those questions, providing a new guide for navigating the territory of cell phone app location data. Where the government seeks to request GPS data from app providers, courts should apply a two-prong voluntariness test, assessing the necessity of the app and the necessity of location sharing for the effective use of the app. This two-prong analysis, in light of relevant factors such as the suspect's special characteristics, the suspect's manifested subjective intent, and the amount of data requested, should render the third-party doctrine and *Carpenter* more effective for modern society.

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Writing Sample

I prepared this brief for the Quarterfinal Round of the Campbell Moot Court Competition at Michigan Law. All facts referenced in the brief are fictional. This draft is self-edited.

8B

IN THE

Supreme Court of the United States

No. 22-0096

H. B. SUTHERLAND BANK, N.A.,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BRIEF FOR PETITIONER

8B
Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITIONER 8B

Other Authorities

Constitutional Provisions

STATEMENT OF THE CASE

A. Introduction

Petitioner H.B. Sutherland Bank, N.A. ("Sutherland") brings this appeal challenging the unconstitutional adjudication of Respondent Consumer Financial Protection Bureau ("CFPB" or "the Bureau")'s claim of Unfair, Deceptive, and Abusive Practices before a CFPB Administrative Law Judge ("ALJ"). The adjudication was unconstitutional for two reasons.

First, the claim brought below is analogous to common law fraud and the public rights exception did not apply, and thus Sutherland had a Seventh Amendment right to a jury trial. Sutherland should have had the opportunity to litigate the matter in an Article III court rather than before an agency official. Second, the ALJ in this matter is unconstitutionally shielded from removal by two layers of for-cause protections, in violation of Article II's Take Care Clause.

B. Statement of Facts

The CFPB brought an adjudication against Sutherland for alleged violations of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r, the Fair Credit Reporting Act, 15 U.S.C. § 1681b(f), and the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau*, 505 F.4th 1 (12th Cir. 2022). For these alleged violations, the Bureau sought several remedies: injunctive relief, restitution in the form of economic damages, and civil money penalties under 12 U.S.C. § 5565. *Id.*

The Bureau brought the adjudication before an ALJ under the Administrative Procedure Act, 5 U.S.C. §§ 500–596, and the ALJ was appointed by the CFPB Director pursuant to 5 U.S.C. § 3105. *See Lucia v. Sec. Exch. Comm'n*, 138 S. Ct. 2044 (2018) (holding that ALJs are inferior officers of the Executive Branch, and must be appointed under the procedures of the Appointments Clause). ALJs are protected by two layers of for-cause removal restrictions, insulating them from direct presidential oversight. Under 5 U.S.C. § 7521, an ALJ is removable only for good cause as

determined by the Merit Systems Protection Board ("MSPB"). Members of the Board are themselves only removable by the President for inefficiency, neglect, or malfeasance. 5 U.S.C. § 1202(d).

The ALJ assigned to the matter found violations of all three statutes and issued a Recommended Order that granted all relief sought by the Bureau, totaling more than $12 million, including, $8 million in economic damages, $4 million in civil penalties, and injunctive relief. *Id*.

C. Procedural History

After the initial agency adjudication, Sutherland appealed the Recommended Decision to the Director of the CFPB, raising the same constitutional arguments presented here, specifically taking issue with the adjudication of the alleged violation of the Consumer Financial Protection Act before an ALJ. *Id.* The Director then issued a Final Order, upholding the ALJ's recommendation. *Id.* Sutherland then filed a petition for review in the Twelfth Circuit Court of Appeals pursuant to 12 U.S.C. § 5563 to set aside the Director's Final Order on constitutional grounds. *Id.* A divided Twelfth Circuit panel found for the CFPB. *Id.* Sutherland then appealed for rehearing en banc. *Id.* The Twelfth Circuit, sitting en banc, upheld the Director's Final Order. *Id.* Sutherland filed a petition for *writ of certiorari* to the Supreme Court, which was granted. Order Granting Writ of Cert.

DISCUSSION

I. THE ADJUDICATION OF THIS MATTER BY AN ADMINISTRATIVE LAW JUDGE VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

The Seventh Amendment states in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Court has since framed this as "preserv[ing] the right to jury trial as it existed in 1791." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). Where a claim was heard in courts of law at

the time of the founding or is sufficiently analogous to a claim that was, and the jury would preserve the common law right as it existed at the time, the Seventh Amendment jury trial right applies. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (citing *Tull v. United States*, 481 U.S. 412, 417 (1987)). In addition to considering any common law analogues to the claim, the Court has emphasized the importance of remedies in assessing the reach of the Seventh Amendment. *See Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 559 (1990).

The Court has on occasion recognized an exception to the Seventh Amendment for matters that vindicate public rights. *See, e.g., Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). Such an exception has historically been limited to cases where the statutory scheme being enforced creates new causes of action that did not exist at common law where their adjudication in Article III courts would dismantle the statutory scheme designed by Congress. *Id.* Neither factor applies in this case, and as such, this matter does not fall within the public rights exception.

A. The Cause of Action and Applicable Remedies for Deceptive Acts and Practices Present Common Law Analogues, Implicating the Seventh Amendment

To determine whether a cause of action is sufficiently analogous to common law, "the Court must examine both the nature of the action and of the remedy sought." *Tull*, at 417 (quoting *Terry*, 494 U.S. at 559). Here, both the nature of the claim and the remedies sought indicate that the Seventh Amendment should apply.

The claim of unfair, deceptive, and abusive practices under the CFPA is analogous to common law fraud. While the elements of the two causes of action are not identical, the test is not whether the claim had an "exact duplicate" at common law but whether a close analogue exists. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). The Twelfth Circuit erroneously determined in dicta that no close common law analogue exists for the present claim. 505 F.4th at

14. In her concurrence, Judge Cartwright argues that the lack of an intent requirement for a finding of deception under the CFPA prevents the conclusion that the claim of unfair, deceptive, and abusive practices is analogous to common law fraud. *Id.* at 25 (Cartwright, J., concurring).

However, her reading of the statutory definition of deception, or rather the lack thereof, fails to recognize that ALJs regularly fill in the definition of deception from common law, imputing an intent requirement. *See, e.g.*, Joshua L. Roquemore, *The CFPB's Ambiguous "Abusive Standard*, 22 N.C. Banking Inst. 191, 193 (2018) ("In [cases for solely deceptive behavior], courts ignore the lack of a statutory definition and rely on a common law definition of deception."). Contrary to Judge Cartwright's claim that the definition of deception should be inferred from the Federal Trade Commission Act (505 F.4th at 25–26), without an actual directive for ALJs to do so, it is reasonable to expect ALJs to apply common law definitions and require a finding of intent for claims of deceptive practices under the CFPA. Even in the present case, the ALJ made an express finding of intent, "determin[ing] that Sutherland had knowledge of the numerous false and misleading statements made to consumers." 505 F.4th at 5.

Once the common law definition of deception is imputed, the claim is closely analogous to common law fraud. Black's Law Dictionary defines deception as "[t]he act of deliberately causing someone to believe that something is true when the actor knows it to be false [or] A trick intended to make a person believe something untrue." *Deception*, *Black's Law Dictionary* (11th ed. 2019). It primarily defines fraud as "a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud*, *Black's Law Dictionary* (11th ed. 2019). Deception and fraud, as defined in the common law, both require intent and misrepresentation, and often where one is present, the other is as well. This means that in practice, "Common law fraud is a core feature of the 'law of deception.'" Edward J. Normand, *Damages*

for Deceit: A Case Study in the Making of American Common Law, 71 N.Y.U. Ann. Surv. Am. L. 333, 336 (2016). Filling in the common law definition of deception, the CFPA's unfair, deceptive, and abusive practices cause of action is closely analogous to common law fraud.

As further evidence of the implied intent requirement in the CFPA, the agency must prove the appropriate level of intent when seeking the imposition of penalties. Statutorily, penalties must be applied differently depending on the level of intent by the offender. 12 U.S.C. § 5565. First-tier offenders, who receive the lowest penalties, are given greater lenience upon demonstration of good faith. 12 U.S.C. § 5565(c)(3)(A). To be considered second- or third-tier, an offender must have acted recklessly or knowingly, respectively. 12 U.S.C. § 5565(c)(2). Because determining intent is essential to the calculation of penalties, it is sufficiently part of the statutory definition to make unfair, deceptive, and abusive practices closely analogous to common law fraud.

The Court must also consider whether the remedies sought in the action would be of the type granted in courts of law, rather than courts of equity, in its Seventh Amendment analysis. *Tull*, 481 U.S. at 417. In this case, the Director's Final Order called for multiple remedies: economic damages, civil penalties, and injunctive relief. Injunctive relief is traditionally an equitable remedy, 42 Am. Jur. 2d *Injunctions* § 13, but the remaining relief sought and granted is legal.

The Court has held that economic damages are "the traditional form of relief offered in the courts of law." *Curtis*, 415 U.S. at 196; *see also Ross v. Bernhard*, 396 U.S. 531, 542 (1970) ("In the instant case, we have no doubt that the [] claim is, at least in part, a legal one. The relief sought is money damages."); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("The Seventh Amendment provides a right to a jury trial where [the claimant] elects to recover statutory damages."). The Court has recognized limited exceptions for categorizing economic damages as equitable. *See Terry*, 494 U.S. at 570–71 (acknowledging exceptions for disgorgement,

back pay, and monetary awards "incidental to or intertwined with injunctive relief") (quoting *Tull*, 481 U.S. at 424). However, none of these exceptions apply to the damages assessed by the ALJ in this case. Rather, the damages were calculated based on "specific harm caused to consumers." 505 F.4th at 13. As such, they are traditionally legal remedies.

The civil penalties assessed in this matter are also legal remedies. The *Tull* court wrote, "A civil penalty was the type of remedy at common law that could only be enforced in courts of law." 481 U.S. at 422. The Court has recognized that damages for the purposes of compensation and punishment are "traditionally associated with legal relief." *Feltner*, 523 U.S. at 352. CFPB civil penalties serve these same purposes: "to punish wrongdoers" and to "provide monetary relief to consumers who were harmed by defendants." Craig Cowie, *Putting Money Back into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, 2021 U. Ill. L. Rev. 1417, 1424–25. Therefore, civil penalties, as money damages seeking traditionally legal purposes, are legal remedies as well.

The proposed use of the civil penalties towards restitution of future victims through the use of a "Civil Penalty Fund" does not convert them into equitable remedies. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 49 n.7 (1989) ("any distinction that might exist between 'damages' and monetary relief under a different label is purely semantic, with no relevance to the adjudication of petitioners' Seventh Amendment Claim"); *see also Feltner*, 523 U.S. at 352 ("We have recognized the 'general rule' that monetary relief is legal.") (citing *Terry*, 494 U.S. at 570). Like the economic damages in this case, the civil penalties do not fall under the categories of monetary relief recognized by the *Terry* court as equitable. 494 U.S. at 570–71. The purpose of the penalties is primarily legal, and the "Civil Penalty Fund" does not change this.

Where the remedies are mixed, as here, the Seventh Amendment applies. *Feltner*, 523 U.S. at 43–44 ("the Seventh Amendment right to a jury applies to all but ['those where equitable rights *alone* were recognized']."") (quoting *Parsons v. Bedford*, 3 Pet. 433, 447 (1830)) (emphasis added by Court). The existence of an injunctive remedy does not remove the matter from the reach of the Seventh Amendment. *See Ross v. Bernhard*, 396 U.S. 531 (1970) (holding that, in a case with both legal and equitable issues, the Seventh Amendment jury trial right is preserved, at least for the legal issues).

Because both the cause of action and the types of remedies sought are of the sort that would have traditionally been heard in a court of law, the Seventh Amendment right to a jury trial applies.

B. The Public Rights Exception Does Not Apply to Deceptive Acts and Practices Claims

The Court has recognized a limited exception in which certain claims vindicating public rights rather than wholly private rights can be heard outside of Article III courts. *Atlas Roofing*, 430 U.S. 442. In making this determination, the Court emphasized that in creating OSHA, the claim's statutory basis, Congress "created a new cause of action, and remedies therefor, unknown to the common law." *Id.* at 461.

As discussed above, the CFPA's unfair, deceptive, and abusive practices statute does not create a new cause of action but rather provides an alternative avenue for litigating an offense closely analogous to a common law cause of action, and the remedies attached—civil penalties, economic damages, and injunctive relief—also existed at common law. Although the statute allows for more efficient litigation than traditional fraud claims, circumventing the challenges of civil class actions or the limits of individual tort claims, such efficiency does not mean that public rights are vindicated. On the contrary, this matter mainly involves the private rights of Sutherland and the consumers on whose behalf the government brought this matter.

The Court's public rights jurisprudence indicates a preference for Seventh Amendment application, as well as skepticism of allowing Congress to set the limits of its own power. *See, e.g.*, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) ("To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can [] withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. . . ."); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n. 23 (1982) ("even with respect to matters that arguably fall in within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts") (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 548–59 (1982)); *Granfinanciera*, 492 U.S. at 61 ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity."). Because the cause of action is closely analogous to one that existed at common law, the remedies are of the sort heard in courts of law, and the rights being implicated are Sutherland's and the consumers' private rights, the government cannot overcome the presumption of Seventh Amendment application.

The Twelfth Circuit erred in considering the public rights exception a "threshold question." 505 F.4th at 9. Rather, the Court has emphasized that the questions of common law analogues and public rights are *intertwined* and not so easily separated.[1] Public rights cases should be adjudicated by agencies only where a "jury trial would be *incompatible*." *Atlas Roofing*, 430 U.S. at 455 (emphasis added). As Judge Bernhard noted in his dissent below, "A jury trial is not incompatible

[1] If anything, the Court's public rights analysis has framed the common law question as dispositive. *See, e.g.*, *Granfinanciera*, 492 U.S. at 54–55 ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. *If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial*.") (emphasis added).

with CFPA claims: at common law, claims such as these *were* decided by juries." 505 F.4th at 35 (Bernhard, J., dissenting). By treating the question as merely one of public benefit, rather than considering the distinctions drawn by the *Atlas* court between novel statutory causes of action and matters that could have been litigated in common law courts of law, the Twelfth Circuit risks twisting the Court's standard into one that is far too permissive, allowing Congress to do precisely what the *Atlas* court warned against: sequestering "wholly private tort, contract, and property cases" from a jury. 430 U.S. at 458.

In addition to considering whether a matter involves a novel cause of action, the Court emphasized that a central question to the "public rights" doctrine is whether the right created by Congress "is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas v. Union Carbide Agr. Products. Co.*, 473 U.S. 568, 594 (1985). Even if this Court finds that the claim of unfair, deceptive, and abusive practices is sufficiently novel to warrant further public rights analysis, the litigation of these claims in Article III courts would not risk disrupting the entire statutory scheme.

In its opinion below, the Twelfth Circuit claimed that allowing jury trials for the adjudication of alleged CFPA violations would "subvert the consumer protection statutory scheme" due to the additional time and resources required by Article III proceedings. 505 F.4th at 11. However, the *Granfinanciera* court noted that concerns of efficiency and cost are "insufficient to overcome the clear command of the Seventh Amendment." 492 U.S. at 63. Further, the Twelfth Circuits fundamental fairness concerns over jurors' ability to interpret and apply the law are misplaced; jurors are regularly entrusted with similarly complex cases, including large-scale fraud. Though the CFPB only brings a limited number of enforcement actions each year, it removes about half of its CFPA enforcement actions to Article III courts. *Enforcement Actions*, Consumer

Financial Protection Bureau, https://www.consumerfinance.gov/enforcement/actions/ (last visited on Jan. 5, 2023). The CFPB's continued reliance on Article III courts and jurors demonstrates that the matters are compatible with jury trials and that the Seventh Amendment should apply to CFPA proceedings.

Because the government sought legal remedies in bringing its claim, which was closely analogous to common law fraud, and the public rights exception does not apply, Sutherland was entitled to a civil jury trial under the Seventh Amendment.

II. DUAL LAYER REMOVAL PROTECTIONS FOR ADMINISTRATIVE LAW JUDGES VIOLATE THE SEPARATION OF POWERS UNDER THE TAKE CARE CLAUSE

The ALJ in this matter is protected by two layers of removal restrictions, which contravenes the Take Care Clause of Article II of the Constitution. To remove an ALJ, the President or Director must refer the matter to the MSPB, who determines whether good cause exists for the ALJ's removal. 5 U.S.C. § 7521(a). The MSPB members, however, are not subject to at-will removal by the President. They too may only be removed for good cause—specifically, only for "inefficiency, neglect of duty, or malfeasance." 5 U.S.C. § 1202(d). Historically, the Court has upheld limited removal protections for inferior officers where appropriate, but the Court has never upheld any dual-layer for-cause removal restrictions within the Executive Branch. Not only are such limits an unconstitutional violation of the president's executive authority, but they are especially inappropriate for ALJs, who are executive officers with significant policy-making authority, and thus require presidential accountability. These removal protections interfere with the President's ability to "take Care that the Laws be faithfully executed," and thus violate Article II of the Constitution. U.S. Const. art. II.

A. Dual Layer For-Cause Removal Protections Are Categorically Unconstitutional

In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), the Court held that dual-layer for-cause removal protections for Board members violated the Take Care Clause of Article II of the Constitution. The Court noted that historically, "the Constitution has been understood to empower the president to keep [executive] officers accountable—by removing them from office if necessary." *Id.* at 483 (citing *Myers v. United States*, 272 U.S. 52 (1926)). The Court has on occasion upheld the use of good cause tenure protections for principal and inferior officers in the executive branch. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding a single layer of removal protections for Federal Trade Commissioners); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding a single layer of removal protections for independent counsel). However, the Court has never upheld dual layer tenure protections for any agency officials. "The added layer of tenure protection makes a difference," wrote the *Free Enterprise* court. 561 U.S. at 495. By barring at-will removal of both the Board members and the SEC Commissioners determining good faith, the Court found, the President "is powerless to intervene" and "his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Id.* at 496.

This emphasis on the functional impact on the President's authority is an essential component of the test established by the *Morrison* court for the constitutionality of removal protections. 487 U.S. at 690 ("The analysis contained in our removal cases is designed to. . . ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."). Just as the *Free Enterprise* court believed that two layers of removal protections unduly interfered with the President's control over the Board and the SEC, the dual-layer protections for ALJs functionally impede the President's control over ALJs and their respective agencies.

The Twelfth Circuit argued that the President's power is not functionally impacted by the removal protections, as the Director, removable at-will by the President, has plenary power to review all ALJ determinations. 505 F.4th at 19. In *Free Enterprise*, the government raised a similar argument, that "the Commission wields 'at-will removal power over the Board *functions* if not Board members." 561 U.S. at 503 (quoting the D.C. Circuit's opinion below in *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008)). The Court was unpersuaded, noting that "[b]road power over Board functions is not equivalent to the power to remove Board members." *Id.* at 504. In other words, reversal is not removal. As in the present case, relying on reversal, revision of procedures, or other alternative methods of control rather than allowing Presidential removal is a wildly inefficient use of agency resources. Rather, these methods are "obviously a poor means of micromanaging" agency officials, requiring the Director to re-determine every matter heard by a particular ALJ. 561 U.S. at 504. Because alternative procedures are so inefficient and costly, they ultimately place a significant functional barrier in the way of the President's executive control. It was for this reason that the *Free Enterprise* court struck down dual layer protections for Board members.

The Court has never upheld any dual layer for-cause removal protections for officers within the executive branch; such removal protections are categorically inapposite to the President's power under the Take Care Clause and are therefore unconstitutional.

B. Administrative Law Judges, as Inferior Officers with Significant Executive Authority, Do Not Fall Under Any Other Removal Exception

This Court should not consider ALJs an exception to the established principle that dual-layer for-cause removal protections violate the separation of powers. Although the *Free Enterprise* court indicated, in dicta, that its holding did not address protections for ALJs, the Court left the door open to such an application of its rule. 561 U.S. at 507 n.10. Justice Breyer's dissent highlights

this opening, counting ALJs among "the potential list of those whom today's decision affects" due to the dual layer protections they receive. *Id.* at 542 (Breyer, J., dissenting).

The case for *Free Enterprise*'s application to ALJs is stronger especially in light of the Court's subsequent holding in *Lucia*. In explaining its choice not to address the constitutionality of ALJ removal restrictions, the *Free Enterprise* court wrote, "Whether [ALJs] are necessarily 'Officers of the United States' is disputed." 561 U.S. at 507 n.10 (citations omitted). The Court later weighed in on this dispute in *Lucia*, finding that ALJs are "Officers" within the meaning of the Appointments Clause. 138 S. Ct. at 2055. The *Lucia* court effectively eliminated this initial barrier to automatic application of *Free Enterprise* to ALJs.[2]

In addition to citing the disputed question as to whether ALJs were Officers under the meaning of Article II, the *Free Enterprise* court indicated that another distinction between ALJs and Board members was that "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." 561 U.S. at 507 n.10. This distinction harkens back to the categorical test[3] of *Humphrey's Executor*, where the Court upheld a single layer of removal protections for members of the Federal Trade Commission due to their "quasi legislative or quasi judicial powers" and limited executive power outside of that capacity. 295 U.S. at 628.

[2] In his *Lucia* concurrence, Justice Breyer recognized this effect: "The majority here removes the first distinction [between ALJs and Board members under *Free Enterprise*], for it holds that the Commission's administrative law judges are inferior 'Officers of the United States.'" 138 S. Ct. at 2061 (Breyer, J., concurring).

[3] Although the *Morrison* court emphasized a functional, rather than categorical, approach to assessing removal protections, (487 U.S. at 689) (the determination "cannot be made to turn on whether or not that official is classified as 'purely executive"), the Court did not do away with categorical analysis altogether. The *Morrison* court noted that the *Humphrey's Executor* categorical classification was still relevant because it "reflected [the Court's] judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will." *Id.* at 691.

Two years after *Free Enterprise*, the Court reaffirmed its reliance on the categorical test when it reframed the test for permissible removal protections in *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). The only remaining exceptions in the Court's jurisprudence were "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 2199–2200 (referencing *Humphrey's Executor*, 295 U.S. 602, and *Morrison*, 487 U.S. 654). This reframing, in effect, narrowed the categorical test to such an extent that ALJs do not fall under either exception.

First, ALJs do not fall under the *Humphrey's Executor* exception for multimember agencies that do not wield substantial executive power. 295 U.S. 602. ALJs, as individual officials, are not influenced by the same "structural protections against abuse of power" that multimember, bipartisan bodies inherently carry. *Seila*, 140 S. Ct. at 2202 (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)). Further, the *Lucia* court wrote that ALJs have "extensive powers" (138 S. Ct. at 2049) and were officers under the "exercising significant authority" test established by the Court in *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). With such substantial power concentrated in single officials, the *Humphrey's Executor* exception cannot apply to ALJs.

Second, ALJs do not meet the requirements for the *Morrison* exception. As framed by the *Seila* court, the *Morrison* exception applies to inferior officers with limited duties and no policymaking or administrative authority. 140 S. Ct. at 2199–2200. As discussed above, ALJs are inferior officers, but that is the only criterion they meet here. In *Morrison*, the independent counsel's duties were "'temporary' in the sense that [she was] appointed essentially to accomplish a single task." 487 U.S. at 672. She was specifically appointed to investigate and prosecute government officials, "but this grant of authority does not include any authority to formulate policy

for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office." *Id.* at 671–72. Where an officer's role is so prescribed, removal protections do not functionally interfere with the President's executive power.

Unlike the independent counsel in *Morrison*, ALJs have significant duties and policymaking authority. In addition to expansive adjudicatory powers, as outlined in 5 U.S.C. § 556(c), ALJs also play a role in crafting agency policy. The Court upheld executive agencies' use of administrative courts as a forum for policymaking in *Sec. & Exch. Comm'n. v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("an administrative agency must be equipped to act either by general rule or by individual order"). ALJs are also not bound by precedent in the same way as Article III judges, meaning they have a greater ability to make value judgments regarding the enforcement of agency policy. *See generally* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 Ala. L. Rev. 693 (2005).

Where an official has such a significant policymaking role, there is an increased need for accountability to the President. One of the recurring themes in the *Free Enterprise* opinion is that the President is "responsible for the actions of the Executive Branch" under Article II. 561 U.S. at 496–97 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)). As the only democratically elected member of the branch, he is the only actor facing the political consequences of agency action. 561 U.S. at 497–98 ("The people do not vote for 'Officers of the United States.' They instead look to the President to guide the 'assistants or deputies. . . subject to his superintendence.'") (quoting The Federalist No. 72, p. 487 (J. Cooke ed.1961) (A. Hamilton)) (citations omitted). The President's need for accountability within the executive branch goes beyond his approval of individual officer's actions as they relate to his policy goals or personal opinions. The President is the face of the branch to the American people, and the public must be

able "to pass judgment on his efforts." *Id.* at 498. Two degrees of insulation between officers and the President interfere with this essential role of the President, especially where, as here, the officer has a substantial policymaking role.

Finally, the *Free Enterprise Fund* court noted that the protections for Board members were exceptionally high, even beyond the two layers. *Id.* at 506 (noting that members of the Board enjoy "significant and unusual protections from Presidential oversight"). ALJs, however, receive nearly the exact same protections. Both ALJs and Board members may only be removed for cause, as determined by a body whose members may only be removed for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d), 561 U.S. at 487. Despite the Court's claims that its holding is solely focused on the Board, its reasoning cleanly applies to ALJs as well, just as Justice Breyer indicated in his dissent.

Administrative law judges do not fall under the exceptions that remain post-*Seila* for *single* layer removal protections, let alone dual layer protections. Further, the distinctions drawn by the Court between ALJs and the Public Company Accounting Oversight Board either no longer exist or are so minor as to negate any difference in treatment. Like Board members, there is no constitutional basis for requiring that ALJs only be removable for cause as determined by a second body also protected from at-will removal. Therefore, dual-layer for-cause removal protections for ALJs violate the separation of powers and are unconstitutional.

CONCLUSION

The adjudication below violated Sutherland's Seventh Amendment right to a jury trial and was initially decided by an administrative law judge unconstitutionally insulated from Presidential removal. For these reasons, the Court should reverse the Twelfth Circuit.

Applicant Details

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Applicant Education

BA/BS From	**Earlham College**
Date of BA/BS	**May 2011**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Morris Tyler Moot Court of Appeals**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 26, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Clerkship Application

Dear Judge Davis:

I am a second-year student at Yale Law School and am writing to apply for a clerkship in your chambers in August 2024. I entered law school intending to become a legal scholar, but as I progressed in my legal education, I found myself drawn to criminal defense and public interest litigation. I want exposure to the spectrum of legal practice, which an appellate clerkship would provide.

During law school, I gained substantial experience in legal writing and research that would make me well-suited to the work of a clerk. I served as a research assistant for two faculty members, as editor-in-chief of *The Yale Journal of Law & the Humanities*, and as a submissions editor for the *Yale Journal of Law and Technology*. For the upcoming academic year, I was selected as a Coker Fellow, which involves working as a teaching assistant to explain legal writing to 1Ls. I participated in three legal clinics, including spending a year as part of Yale's Reproductive Justice Project dealing with the legal repercussions of *Dobbs*. During the summers, I interned with the Federal Public Defender in Connecticut and Americans United for Separation of Church and State. Throughout these diverse roles, I honed my skills in reviewing discovery, drafting motions, crafting memos, composing demand letters, collaborating on the drafting of state legislation, and even co-authoring an amicus brief submitted to the Supreme Court

My resume, transcript, and writing sample are enclosed. I welcome the chance to interview for the position and look forward to hearing from you. Thank you for your consideration.

Sincerely,

Isaac Barnes May

Isaac Barnes May

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EDUCATION

Yale Law School, New Haven, CT
J.D. Candidate, degree expected May 2024
Fellowships: Coker Fellow in Constitutional Law, selected for 2023–2024
Legal History Fellow
Study of Reproductive Justice Student Fellow
Activities: American Constitution Society, Scholarship Committee, Vice President
Morris Tyler Moot Court of Appeals
Research Assistant for Professors Patrick Weil and John Fabian Witt
Clinics: Free Exercise Clinic
New Haven Legal Assistance, Reentry Clinic
Advanced Reproductive Rights and Justice Project
Law Journals: *Yale Journal of Law & the Humanities*, Editor-in-Chief (Vol. 35)
Yale Journal of Law & Technology, Submissions Editor
Yale Law & Policy Review, Editor

University of Virginia, Charlottesville, VA
Ph.D. in Religious Studies (Historical Study of American Religion) and Graduate Certificate in American Studies, May 2020
Activities: Teaching Assistant (taught and graded twenty-one discussion sections in seven courses)
Race, Religion and Democracy Lab Student Research Collaborator
Honors: Interdisciplinary Graduate Fellow in Jewish Studies
Dean's Dissertation Completion Fellow
Archival research fellowships from Haverford and Swarthmore Colleges
Honorable Mention, Zora Neale Hurston Prize for Best Paper on Women, Gender, and/or Sexuality
Graduate Fellowship (full tuition and living stipend for five years)

Harvard Divinity School, Cambridge, MA
M.T.S. (Master of Theological Studies) in Religions of the Americas, May 2014
Work Study: First Church Cambridge Homeless Shelter, Shelter Assistant

Earlham College, Richmond, IN
B.A. in History, May 2011
Honors: Phi Beta Kappa Honor Society
College, departmental, and thesis honors
Work Study: Elementary School Reading Tutor, American Reads

RECENT EXPERIENCE

Americans United for Separation of Church and State, Washington, D.C. (Remote)
Constitutional Litigation Intern (Current Position) Summer 2023
Engaged in legal research and writing addressing establishment clause issues, particularly at the appellate level. Edited and source-cited the writing of the litigation team. Wrote demand letters to address establishment clause violations. Participated in a four-day intensive training in public-interest impact litigation. Programming included classes taught by national experts in litigation strategy, advanced civil procedure and persuasive writing, communications, and legal theory.

Office of the Federal Public Defender, District of Connecticut, New Haven, CT
Legal Intern Summer 2022
Worked with Assistant Federal Defenders on their cases. Drafted motions and wrote memos. Met with clients in detention. Conducted legal research and reviewed discovery. Provided on-site research for trial and attended court proceedings.

Project on Lived Theology, University of Virginia, Charlottesville, VA
Fellow and Faculty Mentor Summer 2021
With project director planned and led a summer internship for undergraduates on religion, civil rights, and social change. Taught weekly seminars to interns, connecting them with faculty mentors who assisted on specific projects. Served as a faculty mentor for three interns, supervising a project on the relationship between religion and desegregation in Virginia.

College and Graduate School of Arts and Sciences, University of Virginia, Charlottesville, VA
Assistant Professor, Department of American Studies 2020–2021
Lecturer, Department of Religious Studies Summers 2017 and 2018; Spring 2020
Designed, graded, and taught seven university courses at undergraduate and graduate levels, including small seminars and 200-person lectures. Mentored students to complete substantive research projects. Supervised three graduate teaching assistants. Conducted academic research and wrote a history book. Served on a Master's thesis committee.

Office of Learning Design and Technology, University of Virginia, Charlottesville, VA
Digital Pedagogy Intern Summer 2020
Trained faculty in online teaching tools and platforms (including Zoom) as part of an emergency initiative to transition teaching online after the COVID-19 outbreak. Presented weekly workshops and held office hours for tech support.

Office of the Vice Provost for Academic Outreach, University of Virginia, Charlottesville, VA
PhD+ Intern 2019–2020
Served on staff of the Vice Provost's office, which was tasked with connecting university resources to community projects in Virginia and the nation. Researched and reported on university grants and programs. Maintained and created content for the office's website using Drupal. Served as the university representative on a community board.

Chaplaincy Services, University of Virginia Hospital, Charlottesville, VA
Chaplain Intern Summer 2019
Worked as a hospital chaplain as part of a clinical pastoral education program. Shared responsibility for spiritual care of two hospital wards with chaplain residents. Collaborated with a multifaith team of Buddhist, Muslim, and Christian chaplains to provide services for a religiously diverse patient population. Operated as part of a rapid response team for patient behavioral emergencies. Served as the sole on-call chaplain in the hospital for weekly overnight shifts.

BOOKS

Authored two books on American religious history. The first, *American Quakers and Resistance to War from World War I Through Vietnam: Law, Politics, and Conscience,* was published by Brill in 2022. The second, *God-Optional Religion in Twentieth-Century America: Quakers, Unitarians, Reconstructionist Jews, and the Crisis of Theism,* was published by Oxford University Press in 2023. Both books include sections exploring the relationship between religion and law, particularly relating to conscientious objection.

ARTICLES AND OTHER PUBLICATIONS

Extensive publication record in religious studies and American history, including ten academic articles, five book chapters, seven encyclopedia articles, and thirteen book reviews. Currently working on two articles to submit to law reviews.

CONFERENCE PRESENTATIONS

Presented thirty-three academic conference presentations and invited lectures at venues that include the American Historical Association, the American Academy of Religion, and the Society for U.S. Intellectual History. Six of these were about law and religion.

TECHNICAL SKILLS
Legal platforms: LexisNexis; Westlaw; PACER; Legal Files
Software: MS Office; Zotero; Tropy; Hindenburg; Scrivener; Archivist's Toolkit; Photoshop; Openshot; iMovie.
Abilities: Podcast and audio editing; oral history training; basic video editing.

VOLUNTEER WORK

- Serves on the American Friends Service Committee's Nobel Prize Task Group, which selects and vets candidates for the nonprofit to nominate for consideration by the Norwegian Nobel Committee.
- Earns a stipend as book review editor of *Quaker History*, a semi-annual scholarly journal founded over a century ago.
- Volunteered with Yale Law Capital Assistance Project, which does defense work on death penalty cases. Collaborated with ACLU's Capital Punishment Project.
- Member of Connecticut Debate Association topics committee, which selects high school debate topics.
- Judge for high school debate and occasionally college mock trial.

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TRANSCRIPT RECORD

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SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I Group 1	4.00	CR	J. Balkin
LAW	11001	Contracts I: Section B	4.00	CR	A. Schwartz
LAW	12001	Procedure I: Section A	4.00	CR	A. Gluck
LAW	14001	Criminal Law & Admin I: Sect A	4.00	CR	F. Doherty
		Term Units 16.00 Cum Units 16.00			
Spring 2022					
LAW	21044	Comparative Law	4.00	H	J. Whitman
		Substantial Paper			
LAW	21230	First Amendment	4.00	P	J. Balkin
LAW	21608	Torts and Regulation	4.00	H	J. Witt
LAW	30201	Legal Assistance:ReentryClinic	4.00	H	E. Shaffer, A. Eppler-Epstein
		Term Units 16.00 Cum Units 32.00			
Fall 2022					
LAW	20226	Evidence	3.00	P	P. Shechtman
LAW	20335	Law and Religion	3.00	H	J. Whitman, M. Doerfler
LAW	20442	DoingConstitutionalLawTheories	2.00	H	A. Amar, P. Bobbitt
LAW	30226	ReproductiveRtsJusticeProject	2.00	H	R. Siegel, P. Smith, K. Kraschel
LAW	30229	ReproductiveRtsJusticeProjFldw	2.00	H	R. Siegel, P. Smith, K. Kraschel
LAW	40001	Supervised Research	3.00	H	J. Balkin
		Supervised Analytic Writing			
LAW	50100	RdgGrp: Scholarship Workshop	1.00	CR	R. Siegel
		Term Units 16.00 Cum Units 48.00			
		Sup. Research: History, Tradition, and the Establishment Clause.			
Spring 2023					
LAW	21285	Law in Western History	4.00	H	J. Whitman
LAW	21408	PhilLawNormative Jurisprudence	3.00	H	G. Yaffe
LAW	30143	Free Exercise Clinic: Seminar	2.00	H	K. Stith, N. Reaves, M. Helfand
LAW	30144	Free Exercise Clinic:Fieldwork	1.00	H	K. Stith, N. Reaves
LAW	30231	AdvReprodRtsJusticeProjFldwk	1.00	H	P. Smith, R. Siegel, K. Kraschel
LAW	50100	RdgGrp:Scholarship Workshop	1.00	CR	R. Siegel
		Term Units 12.00 Cum Units 60.00			

********** END OF TRANSCRIPT **********

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HEATHER ABBOTT, REGISTRAR

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EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in strong support of Isaac May's application for a judicial clerkship.

Isaac was a student in my Constitutional Law Small Group in the fall semester of 2021. He was an excellent student and did very well in the final exam, the brief writing exercise and the oral argument exercise.

I have great confidence in Isaac's abilities. I was so impressed by Isaac, in fact, that I asked him to be one of my two Coker Fellows for my Constitutional Law Small Group this coming year. Coker Fellows help first year students with legal writing and research and help them adjust to the first year of law school. Naturally, Isaac's legal research and writing skills are outstanding, and he is currently serving as the Editor in Chief of the Yale Journal on Law and the Humanities.

Isaac is a very accomplished person, with a Ph.D. from the University of Virginia and a master's from Harvard Divinity School even before he started Yale Law School. He is a serious thinker and an excellent writer. I have greatly enjoyed talking with him about issues of law and religion, and at my urging he wrote an outstanding paper for me on how thinkers on both the left and the right have changed their views about religion, secularism, and political liberalism at the beginning of the twenty-first century. His work shows a wide mastery of different literatures in law, political theory, and religious studies.

I think it is obvious from what I have said that Isaac would make an outstanding judicial clerk. He is a dedicated researcher, a fluent writer, and a brilliant man. He is also a kind and generous person who is easy to work with and makes every group he is part of better.

I recommend him enthusiastically. Hire him, you won't be sorry. He's great!

Sincerely Yours,

Jack M. Balkin
Knight Professor of Constitutional Law and the First Amendment,
Director, The Information Society Project,
Yale Law School

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

Re: Clerkship Application of Isaac May

I write to recommend Isaac May, Yale Law School class of 2024, for a clerkship in your chambers.

Isaac May is a remarkable person, an accomplished, insightful, and deeply engaged scholar of law and religion. He has published two books and many articles. His writing wrestles with profound questions about the place of religion in American life. He is a master prose stylist, whose sentences and paragraphs are framed with crystalline clarity. It seems clear to me that he is destined to be one of the leading voices in our national struggles over the role of faith in our law and our politics.

I have had what I can only call the privilege of his presence as a student in three of my courses, Comparative Law, Law and Religion, and Law in Western History. It is flattering to me that such a fine mind would attend my courses. His participation has certainly not been limited the problems of religion that are his principal concern. He has a broad interest in the law, and he has often weighed in with thoughtful comments on a variety of subjects. But it is certainly the case that religion is his primary concern, and it is a subject to which he brings great learning, great intelligence, and passionate engagement with the American project.

Among his fine writings for me, I might highlight a paper on debates in the revolutionary era and the Early Republic about whether the common law was Christian. Many figures insisted that it was, among the John Adams and Joseph Story. Thomas Jefferson dissented, however. May does a stellar job of working through the technical details of Jefferson's interpretation of common law precedents reaching back to the Middle Ages. His paper is really a tour de force. There are very few scholars who have his ability to parse difficult common law doctrine. And I think it goes without saying that his subject is of critical importance on the contemporary American scene.

That fine paper is just one of his many writings. This is a person who will do work of the first rank, and the greatest public importance, for many years to come. I am proud to have had any part in teaching him the law. If I may say so, I think I would be equally proud, if I were a judge, to have had him in my chambers.

I should add that he is a lovely and modest person, a joy to engage with. I am sure that he would be a wonderful presence in any workplace.

I would be more than glad to say more about this distinctive, and superb, candidate. I am currently in Europe for the Summer, where there is a six-hour time difference, but I can be reached at 203-508-2054. Please do not hesitate to contact me by e-mail if you would like to me to call in from France.

Sincerely yours,

James Q. Whitman

JQW/mb

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I have been asked to write a recommendation for Isaac May who wishes to clerk in your chambers. I am happy to do so.

Mr. May was my student in a seminar co-taught with Professor Akhil Amar at the Yale Law School in the fall of 2022. He was a voluble and persistent critic at the class which from a pedagogical point of view was indispensable to its success.

Mr. May has a Ph.D. in Religious Studies from the University of Virginia as well as a Master of Theological Studies from the Harvard Divinity School. His focus in law school has been, and I believe thereafter will be, on the intersection of constitutional law and church/state relationships and I suspect he will have a productive and insightful career as an academic. I should not be surprised if he supplements his academic work with Legal Aid or other non-profit assistance to persons in need.

Mr. May will be a hard-working and productive clerk, never shy about challenging legal arguments in briefs and precedents. He writes clearly and is an indefatigable researcher. I'm sure you will be pleased with his efforts in his chambers.

Please do not hesitate to contact me if I can be of any assistance in this matter.

Yours very truly,

Philip Bobbitt
Herbert Wechsler Professor of
Federal Jurisprudence
Columbia Law School

Philip Bobbitt - bobbitt@law.columbia.edu - 212-854-4090

WRITING SAMPLE

Isaac Barnes May
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The attached writing sample is a portion of an amicus brief I drafted as part of Yale Law School's Free Exercise Clinic. I have received approval to use this as a writing sample. The brief was submitted for the recent U.S. Supreme Court case *Groff v. DeJoy.*

Groff was about a Sabbath-observant man employed by the U.S. Postal Service who lost his job when USPS took a contract with Amazon requiring Sunday delivery. While Title VII prohibits workplace religious discrimination, the 1977 case *Trans World Airlines, Inc. v. Hardison* held that any accommodation that incurred more than a *de minimis* cost posed an undue burden on employers. In the brief, the clinic represented four Seventh-day Adventist church bodies and an Orthodox Jewish organization, whose members observe the Sabbath from Friday to Saturday evening. Our clients collectively had a membership of 330,000 people and 1,500 churches and synagogues. They sought to challenge the *Hardison* standard to better protect the ability of their membership to observe their faith without fear of losing their jobs.

Because I have an academic background in the study of religion, I was selected to write the first section of the brief (attached), highlighting how rising antisemitism and religious discrimination worsen the effects of *Hardison*. Subsequent sections, which I assisted in planning but did not write, consider how several U.S. states and Canada have successfully implemented more stringent workplace protections with no apparent harm. Finally, the brief addressed a potential criticism that changing the *Hardison* standard might allow disruptive proselytizing in the workplace. The portion I have included here was a draft solely written by me and differs slightly from the submitted version. However, in my writing, I incorporated feedback from my clinic supervisor and colleagues on an earlier draft.

I was pleased how the brief turned out because it represented the clients' particular interests and raised points not highlighted in the petitioner's merits brief. In his *Hardison* dissent, Justice Thurgood Marshall declared that "[a] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." I hope that the brief exposed the Court to the perspective of these minority faiths, whose members frequently have faced exactly such a dilemma.

TABLE OF CONTENTS

Page

Argument

I. The Hardison standard disproportionately harms religious minorities' ability to practice their faith.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Supreme Court greatly restricted employees' ability to receive accommodations for religious practices such as Sabbath observance, holding that any accommodation that imposed more than a *de minimis* cost places an "undue hardship" on the employer. 432 U.S. 63 (1977).

The result sharply limits the legal protections offered to religious minorities, especially Jews, Seventh-day Adventists, and other minority faiths who place importance on Saturday Sabbath observance. *See e.g.*, *Equal Emp. Opportunity Comm'n. v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021).

A. *Hardison's* low bar for employers weighs heavily on Saturday Sabbath observers, undermining Title VII and bolstering religious prejudice and antisemitism in the workplace.

For religious minorities in particular, *Hardison* thus represented a step backward from the promise of Title VII and its 1972 amendment. By enacting Title VII of the Civil Rights Act of 1964 Congress intervened in a long history of discrimination and hostile treatment towards religious minorities. For too long, public and private religious bigotry had been entrenched in

American life. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 828–829 (2000) (plurality opinion) (discussing one example of laws' "pervasive hostility" to religious groups).

Jews had been systemically discriminated against by law and denied civil rights protections. Britt P. Tevis, *"Jews Not Admitted": Anti-Semitism, Civil Rights, and Public Accommodation Laws*, 107 J. Am. Hist. 847 (2021). State prohibitions preventing Jews from being able to vote persisted until as late as 1877. Leonard Dinnerstein, *Antisemitism in America* 15 (1994). That same year, the New York State Bar refused to admit a candidate on the grounds that he was Jewish. *Id.* at 38. Large law firms remained segregated along religious lines through the 1960s. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 Stanford L. Rev. 1803, 1811 (2008).

Similarly, Seventh-day Adventists—one group of Protestants who observe the Sabbath on Saturdays—routinely faced criminal prosecution for their refusal to follow state laws requiring the observation of the Sabbath on Sundays, and they were subject to fines and imprisonment. The Supreme Court of Arkansas upheld the conviction of John W. Scoles in 1886 for violating the Sabbath after proof showed that he "was found painting a church on a Sunday." *Scoles v. State,* 1 S.W. 769, 770 (Ark. 1886). Robert M. King, a farmer, was imprisoned by a Tennessee court in 1891 for plowing his field on a Sunday, and had his appeal rejected by a federal court. *In Re King*, 46 F. 905 (Cir. Ct. W.D. Tenn. 1891).

7

Four years later, eight Adventist men were jailed in Tennessee for not keeping the Sabbath on Sunday. *Adventists in Jail in Tennessee*, American Sentinel, Jul. 11, 1895, at 217. In 1889, after taking part in successful efforts to stop Congress from instituting national Sunday Sabbath observance, Seventh-day Adventists founded the National Religious Liberty Association to continue to oppose the introduction of religiously based legislation in Congress and state legislatures. Douglas Morgan, *Adventism and the American Republic: The Public Involvement of a Major Apocalyptic Movement* 47 (2001).

Confronting this history of religious intolerance, Congress amended Title VII in 1972 to provide greater accommodation for the religious observances and practices of employees in the workplace. Pub. L. No. 92-261, 86 Stat. 103 (1972). The amendment's author, West Virginia Senator Jennings Randolph, was a Seventh-day Baptist. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Employ. & Labor Law 575, 584 (2000).

Randolph introduced the amendment to protect the rights of Saturday Sabbath observers such as Seventh-day Baptists, Orthodox Jews, and Seventh-day Adventists, communities which Randolph explained "think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening." Legislative History of the Equal Employment Opportunity Act of 1972, 712 (1972) (quoting Jennings Randolph). Randolph decried

the "partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.*

Saturday Sabbath observance is a core part of many religious traditions, including Judaism and Seventh-day Adventism, so protecting its practice is integral and critical to religious expression. In the nineteenth century, Rabbi Samson Raphael Hirsch, whose writing was influential in Orthodox Judaism, explained that desecration of the Sabbath through "the slightest, least arduous productive activity on the Sabbath implies the denial of God as Creator and Lord." Samson Raphael Hirsch, *The Nineteen Letters* 87 (Jacob Breuer ed., Bernard Drachman trans., 1969).

Prominent Jewish theologian Rabbi Abraham Joshua Heschel described Judaism as "a religion of time aiming at the sanctification of time" and explained that keeping the Sabbath weekly by refraining from labor, was the primary way to accomplish this sanctification, connecting humanity and the divine. Abraham Joshua Heschel, *The Sabbath* 8, 16 (Paperback Edition ed. 2005). While other traditions venerated sacred spaces, objects, or persons, Heschel declared that in Judaism "the Sabbaths are our great cathedrals." *Id* at 8.

Seventh-day Adventists share this deep reverence for the Sabbath. Ellen G. White, one of the founders of Seventh-day Adventism, taught that "[w]hen the foundations of the earth were laid, then was also laid the